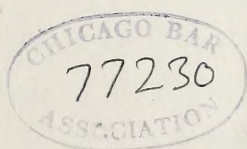


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35316

E. H. ASHDOWN,
Defendant in Error,
vs.
THE VILLAGE OF MATTESON,
Plaintiff in Error.

8/10
7
ERROR TO CIRCUIT COURT
OF COOK COUNTY.

264 I.A. 615'

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover for services claimed to have been rendered by him as engineer in connection with the making of certain local improvements in the village of Matteson. The improvements were to be made under the Local Improvement act and to be paid for by special assessment. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for \$2612.27, which was made up of two items, one of \$2009.44 and \$602.83 interest thereon. This amount was allowed by the court in payment of engineering services performed by plaintiff for one of the proposed improvements. Plaintiff was not allowed anything for the services he performed on five other proposed improvements. The defendant appeals, claiming there should have been a finding and judgment in its favor, and plaintiff has assigned cross-errors claiming that he should be paid for the work he did on the five jobs which the court disallowed and that on these several sums he was also entitled to interest.

The record discloses that at the request of the Board of Local Improvements of the defendant Village plaintiff was instructed to do the necessary engineering work on the six improvements which were proposed to be made and paid for by special assessment in accordance with the provisions of the Local Improvement Act. And the evidence is that plaintiff performed the services. He

THE VILLAGE OF WATERBURY,
Plaintiff in Error.
vs.
E. H. ASHDOWN,
Defendant in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

264 I.A. 615

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover for services claimed to have been rendered by him as engineer in connection with the making of certain local improvements in the village of Waterbury. The improvements were to be made under the local improvement act and to be paid for by special assessment. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for \$2612.27, which was made up of two items, one of \$2000.44 and \$602.83 interest thereon. This amount was allowed by the court in payment of engineering services performed by plaintiff for one of the proposed improvements. Plaintiff was not allowed anything for the services he performed on five other proposed improvements. The defendant appeals, claiming there should have been a finding and judgment in its favor, and plaintiff has assigned cross-errors claiming that he should be paid for the work he did on the five jobs which the court disallowed and that on these several items he was also entitled to interest.

The record discloses that at the request of the board of local improvements of the defendant village plaintiff was instructed to do the necessary engineering work on the six improvements which were proposed to be made and paid for by special assessment in accordance with the provisions of the local improvement act. And the evidence is that plaintiff performed the services. He

introduced evidence of their reasonable value, and that the assessment was confirmed for one of the proposed improvements, but that later all six of them were abandoned by the Village and plaintiff received no pay for the work he did. The defendant filed a plea of the general issue and notice of special matters to be relied upon, and an affidavit of merits.

One of the defenses interposed was that plaintiff was employed by defendant under a written contract, whereby his remuneration was contingent and conditional upon the completion of the six local improvements, - that he was not to be paid except out of the special assessment funds. This defense was sworn to by the president of the Village. The defendant contends, however, that the written contract was void because there was no appropriation made prior to the time plaintiff was employed, as the statute required, and that no appropriation had ever been made to pay plaintiff; that the contract for the engineering services to be rendered in connection with the proposed improvements was in excess of \$500 and was not let to the lowest responsible bidder, as the statute requires. The defendant offered no evidence to prove that plaintiff had been employed under the terms of a written contract as it had alleged, nor was there any evidence on this subject, and although plaintiff testified and was cross-examined by counsel for the defendant, he was not asked the terms of his employment, so there is an entire absence of evidence on the question whether plaintiff's payment was to be conditional upon the collection of the assessments.

It is undisputed that plaintiff performed the services for which he sued and that they were reasonably worth as much or more than he is claiming. The evidence discloses that plaintiff and defendant were both contemplating that plaintiff would be paid out of the special assessment funds and therefore it was unnecessary that an appropriation be made prior to his employment or at any

introduced evidence of their reasonable value, and that the assessment was confirmed for one of the proposed improvements, but that later all six of them were abandoned by the Village and plaintiff received no pay for the work he did. The defendant filed a plea of the General Issue and notice of special matters to be tried upon, and an affidavit of merits.

One of the defenses interposed was that plaintiff was employed by defendant under a written contract, whereby his remuneration was contingent and conditional upon the completion of the six local improvements, - that he was not to be paid except out of the special assessment funds. This defense was sworn to by the defendant of the Village. The defendant contended, however, that the written contract was void because there was no appropriation made prior to the time plaintiff was employed, as the statute required, and that no appropriation had ever been made to pay plaintiff; that the contract for the engineering services to be rendered in connection with the proposed improvements was in excess of \$500 and was not let to the lowest responsible bidder, as the statute required. The defendant offered no evidence to prove that plaintiff had been employed under the terms of a written contract as it had alleged, nor was there any evidence on this subject, and although plaintiff testified and was cross-examined by counsel for the defendant, he was not asked the terms of his employment, so there is no entire absence of evidence on the question whether plaintiff's payment was to be conditional upon the collection of the assessments.

It is undisputed that plaintiff performed the services for which he sued and that they were reasonably worth as much or more than he is claiming. The evidence discloses that plaintiff and defendant were both contemplating that plaintiff would be paid out of the special assessment funds and therefore it was unnecessary that an appropriation be made prior to his employment or at any

time, to pay for such services. Kelker v. McLain, 257 Ill. App. 637. In that case, where a similar question was involved, we said: "We think it must be held that the contract is one requiring services in connection with local improvements for which assessments are to be levied and that section 4 of article 7, chap. 24 of the Illinois Revised Statutes is not applicable. It is so held in Gass v. Village of Wilmette, 230 Ill. 428, and Murrie v. Harger, 249 Ill. App. 526." And we there held that where work is done under proposed improvements to be paid for by special assessment, and the municipality afterwards abandons such improvements, the person rendering the services is entitled to be paid for the work done and that no appropriation by the municipality is necessary. So, in the instant case the defendant Village having abandoned the six proposed improvements and both parties having in mind that plaintiff was to be paid out of the special assessment funds when collected, plaintiff cannot be deprived of his pay because no appropriation was made.

The defendant further contends that the records of the Board of Local Improvements which were introduced in evidence, do not show a "yea" and "nay" vote of the members of the Board of Local Improvements as required by par. 44, chap. 24, Cahill's Statutes, which provides: "The yeas and nays shall be taken upon the passage of all ordinances, and on all propositions to create any liability against the city, or for the expenditure or appropriation of its money, and in all other cases at the request of any member, which shall be entered on the journal of its proceedings; and the concurrence of a majority of all the members elected in the city council shall be necessary to the passage of any such ordinance or proposition: Provided, it shall require two-thirds of all the aldermen elect to sell any city or school property." This section of the statute applies to the Board of Trustees of villages as well as to

city councils. It is obvious that it has nothing to do with the records kept by the Board of Local Improvements of a city or village. The Local Improvement act of 1897, under which the proposed improvements were to be made, provides how the records of the Board of Local Improvements shall be kept; and we think the records in the instant case are in accordance with the provisions of the Local Improvement act. The defendant does not point out wherein the records of the Board of Local Improvements do not comply with the act. There is no merit in this contention.

A further point is made that there is no evidence that the services performed by plaintiff were not those required to be performed by him as village engineer of the defendant. There is no evidence what duties he was required to perform as village engineer, but in one of the proposed improvements an item of the engineer's estimate shows that his services were to be paid for out of the special assessment.

As to the cross-errors assigned by plaintiff, that there was no substantial reason why plaintiff should be paid for the work he did in connection with one of the proposed improvements, and not the others, we think this contention must be sustained. The services plaintiff rendered were similar in all six proceedings, and the fact that one of them had gone so far as to have the special assessment confirmed before it was dismissed, does not render the service performed by plaintiff different from that he rendered in connection with the other five. But we think plaintiff is not entitled to recover interest because a municipality is not to be charged with interest in the absence of an express agreement or a statute authorizing it, except where money belonging to one is wrongfully obtained and illegally withheld by a municipality.

Conway v. City of Chicago, 237 Ill. 128; Smith v. County of Logan, 284 Ill. 163. The evidence shows that the services performed by plaintiff for the defendant in connection with the six proposed improvements were reasonably worth: (1) \$2009.44; (2) \$424.81; (3) \$438.75; (4) \$227.07; (5) \$393.61; and (6) \$489.15; making a total of \$3952.53.

For the reasons stated, the judgment of the Circuit court of Cook county is reversed and judgment entered in this court in favor of plaintiff and against the defendant for \$3952.53.

JUDGMENT REVERSED AND JUDGMENT
ENTERED IN THIS COURT.

McSurely and Hatchett, JJ., concur.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
WASHINGTON, D. C. 20540
MAY 19 1961
TO: THE SECRETARY OF THE INTERIOR
FROM: THE ATTORNEY GENERAL
SUBJECT: [REDACTED]

The above-captioned matter is being referred to you for your consideration and action. It is requested that you advise this Bureau of the results of your action.

Very truly yours,
[REDACTED]
Assistant Attorney General

Enclosure (1) - [REDACTED]

35338

WALTER SHAVER,
Defendant in Error,

vs.

PHILIP YARROW,
Plaintiff in Error.

2 7
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 615²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages claimed to have been sustained by reason of an alleged malicious prosecution instituted by the defendant. There was a verdict and judgment in plaintiff's favor for \$5,000 and the defendant appeals.

The record discloses that on the evening of December 17, 1929, the defendant caused plaintiff to be arrested and taken to a police station in Chicago and thereupon some officer at the police station filled out an information which the defendant, Yarrow, signed and swore to. The information charged that on December 17th Shaver unlawfully offered to Yarrow for sale a certain lewd, obscene and indecent book in violation of sec. 223 of chap. 38, Cahill's Statutes. Shaver was there confined for about three hours, when he was released upon giving bail. Afterwards the case was tried in the Municipal court before a judge and a jury, the jury returned a verdict finding the defendant not guilty, judgment was entered on the verdict and defendant was discharged. Shaver afterwards brought the present case to recover damages.

The evidence in substance is to the effect that Yarrow was superintendent of the Illinois Vigilance Association, a corporation not for profit; that the association, under the superintendency of Yarrow, sought among other things to suppress the sale

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and distribution of obscene books; that Yarrow as superintendent had employed one Brown as an investigator to look into such matters; that on the 15th or 16th of December, 1929, Brown went into one of plaintiff's bookstores located on the North Side ^{of} Chicago, and after looking at some of the books on sale talked with Shaver and asked for ^a book entitled, "A Night in a Moorish Harem;" that Shaver said he did not have the book but thought he could obtain it for Brown; that the price of the book was \$20; that Brown then made a deposit of \$2 (for which plaintiff gave him a receipt as follows: "12/16/29 Received on a/c of Book \$2.00 Bal \$18.00") and was to call the next day for the book, when the balance was to be paid; that Brown then left the store and communicated with Yarrow, giving an account as to what took place between Brown and the plaintiff; that Yarrow took the matter up with the police department and about six o'clock on the afternoon of December 17th Brown (followed by Yarrow and some officers) went to plaintiff's store to obtain the book; that Brown entered the store and talked to Shaver, who handed him the book. At that time Yarrow took the book from Brown and Shaver was placed under arrest by the officers and taken to the police station.

It is admitted by counsel for both parties that the book is too obscene to be abstracted and that a sale of it is a violation of the statute. The only dispute in the evidence is as to what took place between Brown and Shaver at the time Brown asked for the book on his first visit to plaintiff's store, Shaver's version of the matter being that he did not know the nature of the book, - had never heard of it - and did not know it was an obscene book when he delivered it to Brown at the time of his arrest. The statute provides that, "Whoever brings, or causes to be brought into this State, for sale or exhibition, or shall sell or offer to sell, or shall give away or offer to give away, or have in his

possession, with or without intent to sell or give away, any obscene and indecent book *** shall be confined in the county jail not more than six months or be fined not less than \$100 nor more than \$1,000 for each offense." (Para. 455, sec. 223, chap. 38, p. 1055, Cahill's 1931 Statutes.)

The fact that Shaver was placed under arrest and charged with a criminal offense in the information which was sworn to by Yarrow ^{and} that there was a trial and Shaver found not guilty, would not entitle him to maintain an action to recover damages for such prosecution if there was probable cause for Yarrow, acting as a reasonable, cautious man under the circumstances, to believe that Shaver was guilty of the charge, or if Yarrow, before filing the information, fairly presented all the facts to the Judge of the Municipal court. The fact that one is arrested and prosecuted on a criminal charge, although he is innocent does not give such person the right to recover damages for such prosecution if the person making the charge had reasonable grounds for believing that the accused was guilty, even though the person making the charge acted maliciously. Israel v. Brooks, 23 Ill. 526. In that case the court said (p. 528): "Malice is a fact which can be proved by the circumstances attending the getting up of the prosecution, but if there be probable cause for the prosecution, the malice of the prosecutor weighs nothing, though the accused be innocent." And in an action for damages for malicious prosecution the question whether there was probable cause in bringing the criminal proceeding is generally a question of fact for the jury; but where all reasonable minds would reach the conclusion that there was or was not such probable cause, then the question is one for the court. In the instant case it is conceded by both parties that the book sold by Shaver to Brown was obscene and the sale of it a violation of the plain wording of the statute; and although the jury by their verdict in effect

found that Shaver did not know the character of the book (although this question was not squarely presented to the jury by any instruction) yet we are clearly of the opinion that the finding is manifestly against all of the evidence. When we consider the title of the book, the fact that the price was \$20, the receipt above mentioned, which does not purport to be given by Shaver or any person or concern and does not name the book, and that Shaver was at that time conducting five different bookstores, we think it obvious that Shaver knew that the sale of the book was a violation of the law.

The defendant further contends that the judgment is wrong and should be reversed because on the trial of the case plaintiff offered in evidence the information, which contains a statement by a Judge of the Criminal court that he has examined the person presenting the information and had heard evidence and was satisfied that there was probable cause for filing it, and leave was given to file the information, it was ordered that a caapias issue against Shaver and bail was fixed at \$1,000. The argument in support of this is that where one who is about to file an information charging a person with the commission of the crime appears before a judge of the Municipal court and fairly states the facts to a judge of that court and the judge makes an endorsement on the information as above stated, this is a complete defense to an action for such prosecution, although the one accused be entirely innocent of the charge made against him. The law is as counsel for the defendant contends, but it has no application in this case because all the evidence shows that Shaver was arrested at the bookstore, taken to the police station, the information filled out and sworn to by Yarrow, and Shaver was kept in the jail for three hours, long before any endorsement was made by a judge of the Municipal court. Obviously such endorsement was of no effect here. If Yarrow would be protected on this ground, he should have explained the matters

[illegible]

to the judge before he caused the arrest.

There is no charge in the declaration in the instant case that Shaver was entrapped into selling the book. The substance of such charge was contained in the second count of the declaration, but this was withdrawn on plaintiff's motion during the trial. Whether there was any merit in this phase of the case is obviously not before us. Love v. The People, 160 Ill. 301.

For the reason that the verdict is manifestly against all of the evidence, the judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Hatchett, JJ., concur.

It is the duty of the State to protect the citizen.

There is no doubt in the minds of the people.

And the State is not to be held responsible for the actions of its citizens.

It is the duty of the State to protect the citizen.

And the State is not to be held responsible for the actions of its citizens.

It is the duty of the State to protect the citizen.

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And the State is not to be held responsible for the actions of its citizens.

It is the duty of the State to protect the citizen.

35344

CHARLES WYTISKA,
Defendant in Error,

vs.

JOSEPH LANCE et al.

CHICAGO CAB COMPANY,
Plaintiff in Error.

3 7
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 615³

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against Joseph Lance and Anthony Montegna doing business as the Montegna Motor Express Company, Chicago Cab Company and Checker Taxi Company, to recover damages for personal injuries claimed to have been sustained by him as a result of defendant's negligence. The suit was dismissed as to the Checker Taxi Company and there was a jury trial and a verdict finding the defendants Joseph Lance and Anthony Montegna, doing business as the Montegna Motor Express Company, not guilty, finding the defendant the Chicago Cab Company guilty, and assessing plaintiff's damages at \$1500. Judgment was entered on the verdict and the Chicago Cab Company appeals.

The record discloses that about four o'clock on the morning of November 1, 1930, plaintiff and a friend were passengers in a cab belonging to the Chicago Cab Company, which was being driven by the company's chauffeur southwesterly in Blue Island, and when it reached the intersection of that street with 22nd street and Ashland avenue, it was struck by a truck belonging to Lance and Montegna which was being driven north in Ashland avenue, and plaintiff was injured. There was evidence offered on behalf of Lance and Montegna to the effect that as the truck reached the intersection the signal lights were green, and the truck therefore continued northward and when it reached about the middle of the

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intersection the lights changed and the collision took place somewhere near the center of the intersection.

On the other hand, there was evidence offered on behalf of the Chicago Cab Company to the effect that as the cab reached the intersection the lights were green and the cab proceeded through the intersection, when it was struck by the truck. From this it appears that there was a direct conflict in the evidence as to whether truck or cab had the right of way as indicated by the signal lights, and therefore the question was one of fact for the jury. The jury, by their verdict, found that the Cab company was to blame and we are not disposed to disturb their verdict. From what we have said it is obvious that we disagree with the argument of counsel for the Cab company that the testimony shows, as a matter of law, that the driver of the truck was guilty of negligence in "crashing" the lights.

A further point is made that the court should have arrested the judgment because there was no allegation in the declaration that plaintiff was in the exercise of due care for his own safety and that therefore the declaration did not state a cause of action. Of course, a declaration which does not state a cause of action is insufficient to sustain a judgment, and it is also the law that in an action to recover damages for personal injuries a declaration must allege that the plaintiff was in the exercise of due care for his own safety. But it is also the law that although there may be no such express averment, such facts may be averred in regard to plaintiff's conduct or the circumstances surrounding him, from which due care on his part may reasonably be inferred; and if this appears the declaration is sufficient. Walters v. City of Ottawa, 240 Ill. 267; Stephens v. I. C. R. R. Co., 256 Ill. App. 111. In the instant case, we think the declaration is sufficient. It is alleged that the Cab company was a common carrier and that

investigation the lights changed and the collision took place some-
what near the center of the intersection.

On the other hand, there was evidence offered on be-
half of the Chicago Gas Company to the effect that at the time
preceding the intersection the lights were green and the car
proceeded through the intersection, when it was struck by the truck.
From this it appears that there was a signal conflict in the position
as to whether the car was the right of way in proceeding to the
signal lights, and therefore the position was not in favor of the
jury. The jury, by their verdict, found that the Gas company was
to blame and we are not disposed to disturb their verdict. From
what we have said it is obvious that we disagree with the argument
of counsel for the Gas company that the testimony given, as a matter
of law, was the basis of the trial and basis of judgment in
"verdict," the signal.

A further point is made that the court should have re-
fused the judgment because there was no allegation in the deca-
ration that plaintiff was in the exercise of the right for his own
safety and that therefore the declaration did not state a cause of
action. Of course, a declaration which does not state a cause of
action is insufficient to sustain a judgment, and it is also the
law that in an action to recover damages for personal injuries a
declaration must allege that the plaintiff was in the exercise of
the right for his own safety. But it is also the law that although
there may be no such express averment, such facts may be averred
as regard to plaintiff's conduct as the circumstances surrounding
him, from which the fact in his case may reasonably be inferred;
and it this supports the declaration is sufficient. Chicago Gas
Co. v. Chicago, 240 Ill. 207; Chicago v. I. C. & N. W. Ry. Co., 240
Ill. In the instant case, we think the declaration is sufficient.
It is alleged that the Gas company was a common carrier and that

plaintiff was a passenger in the cab for hire, and while he was being driven southwesterly in Blue Island avenue was injured through the negligence of the defendants. We think this is a sufficient allegation to show that plaintiff was in the exercise of due care for his own safety.

A further complaint is made that the court erred in giving two instructions. By one of these instructions the jury were told that it is the law of this State "that no person shall drive a motor vehicle upon any public highway in this State at a speed greater than reasonable and proper having regard for the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person." It is said that this instruction is vicious and should never be given although it is in the words of the statute - that "It amounts to this, that any speed which endangers another is prohibited, regardless of the conduct of that other person." We think the jury were not misled by the instruction. They were clearly told that before plaintiff could recover he must show that he was in the exercise of due care and caution for his own safety, and that if defendants Lance and Montegna were in no way negligent, and if the jury further believed from the evidence that the plaintiff was injured solely through the negligence of the Cab company, then they should find Lance and Montegna not guilty. The issues in the case were simple and easily understood and we think there was no serious error in the giving of the instruction. Although it is abstract in form it states a correct principle of law, and we think it was not misleading in this case.

The complaint as to the other instruction is that the jury were told that the plaintiff had alleged in his declaration that he was in the exercise of all due care and caution for his own

plaintiff was a passenger in his car for hire, and while he was
being driven negligently by the driver, who was injured
through the negligence of the defendant. We think this is a
sufficient allegation to show that plaintiff was in the exercise
of due care for his own safety.

A further complaint is made that the court erred in
giving two instructions. By one of these instructions the jury
was told that it is not law to say that a person could
have a duty towards a third party who is injured by a
third person, and that a person who is injured by a
third person is not responsible for the injury. It is said that this
is to leave the property of any person. It is said that this
instruction is wrong and should never be given although it is
in the words of the statute - that "it amounts to this, that any
person who endangers another is prohibited, regardless of the
cause of that danger." We think this jury was not misled
by the instruction. They were clearly told that before plaintiff
could recover he must show that he was in the exercise of due care
and caution for his own safety, and that it behooves him to
behave in no way negligent, and it is the jury's duty to believe
from the evidence that the plaintiff was injured solely through the
negligence of the defendant, and they should find him to be
guilty of negligence. The issue in the case was simple and easily
understood and we think there was no serious error in the giving
of the instruction. Although it is stated in the record that
certain principles of law, and we think it was not misleading in
this case.

The complaint as to the other instruction is that the
jury were told that the plaintiff had alleged in his declaration
that he was in the exercise of all due care and caution for his own

safety prior to and at the time of the accident. The complaint is that there was no such allegation. What we have said about the sufficiency of the declaration is sufficient to show that there is no merit in the point made. Plaintiff alleged facts which showed that he was in the exercise of due care, and this was sufficient.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

35354

DILKS CONSTRUCTION COMPANY,
a Corporation,

Appellee,

vs.

WILLOUGHBY TOWER BUILDING CORPORATION,
Appellant.

4
APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

264 I.A. 615⁴

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment for \$4640.37, rendered by the court on the pleadings. Plaintiff's declaration was on a written contract entered into between the parties whereby plaintiff agreed to sell and defendant agreed to buy certain interest coupons appurtenant to bonds of the defendant and owned by the plaintiff, the principal of the bonds aggregating \$200,000. The coupons by their terms were payable only out of certain net rentals, and there being default in the payment of some of them, the written agreement was entered into, whereby plaintiff was to sell to defendant 320 coupons of the face value of \$32.50 each, or a total of \$10,400, for \$3250 and other coupons for the face value thereof. The contract further provided that the coupons were to be delivered up to the defendant uncanceled. It further appears that plaintiff tendered the coupons of the face value of \$10,400 and received from defendant \$3250 and afterwards tendered coupons for which defendant paid the face value thereof, all of such coupons being delivered by plaintiff to defendant uncanceled; that default was made under the terms of the contract in the payment of the coupons falling due in 1931, and on account of this default suit was brought.

The defendant interposed two defenses: (1) that there was no good or valuable consideration for the making of the contract, and (2) that the contract was ultra vires the defendant corporation.

THE UNITED STATES OF AMERICA
v.
JOHN EDGAR HOOVER

IN SENATE CHAMBERS
WASHINGTON, D.C.

THE UNITED STATES OF AMERICA
v.
JOHN EDGAR HOOVER

By this appeal the defendant seeks to reverse a judgment of the District Court of the Southern District of New York, rendered by the court on the pleadings. Plaintiff's declaration was on a written contract entered into between the parties whereby plaintiff agreed to sell and defendant agreed to buy certain interest coupons appurtenant to bonds of the defendant and owned by the plaintiff, the principal of the bonds aggregating \$100,000. The coupons by their terms were payable only on certain specified dates, and there being default in the payment of such coupons, the written agreement was subject to, whereby plaintiff was to sell to defendant 500 coupons of the face value of \$20.00 each, or a total of \$10,000, for \$3,000 and other coupons for the face value thereof. The contract further provided that the coupons were to be delivered up to the defendant immediately. It further appears that plaintiff tendered the coupons of the face value of \$10,400 and received from defendant \$3,000 and afterwards tendered coupons for which defendant paid the face value thereof, all of such coupons being delivered by plaintiff to defendant as cancelled; that default was made under the terms of the contract in the payment of the coupons falling due in 1932, and on account of this default suit was brought.

The defendant introduced two witnesses: (1) that there was no such written agreement for the sale of the coupons and (2) that the agreement was void under the provisions of the contract.

The court sustained a demurrer to pleas setting up these defenses, the defendant elected to stand by its pleas, and judgment was entered as above stated.

In this court the defendant contends that the judgment is wrong and should be reversed because the contract, which was the basis of the suit, was entered into without any good and valuable consideration and that it was ultra vires because of no consideration, so that both points made by the defendant are based on the fact that there was no consideration for the making of the contract. We think the contention cannot be sustained. By the terms of the contract the defendant obtained coupons of the face value of \$10,400 upon payment of \$3250. This was a sufficient consideration to bind both parties, although by the terms of the contract subsequent coupons were to be purchased at the face value.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

35436

WILLIAM HARTMAN,
Appellee,

vs.

JACOB G. LEVINSON,
Appellant.

5
7
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

264 I.A. 616

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover \$525 which he claimed was due him by reason of expenditures made by him in completing the building and \$250 on account of a rental rebate. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for \$343, and the defendant appeals.

The record discloses that defendant was constructing a building and entered into a lease with plaintiff whereby plaintiff was to rent the premises and use them in his undertaking business. When the time came for plaintiff to take possession of the building he contended that it was not complete and made complaint of this to the defendant, specifying in writing what plaintiff considered should be done towards the completion of the building so as to make it usable by plaintiff in his business. The defendant took the position that the building was completed in accordance with the terms of the written lease and refused to do any of the work requested by plaintiff, whereupon plaintiff had the work done and paid for it. The court allowed but one item - that of \$93 for work done by plaintiff to ventilate the skylight of the building so that it would conform to the ordinance of the City of Chicago, and he was allowed a rebate of rent for twenty-five days, making \$250.

There were two counts in the declaration, one a special count and the other the consolidated common counts. At

STATE

CHIEF CLERK

1917

CLERK OF COURT

33414.618

IN SENATE JANUARY 1, 1917
REPORT OF THE COMMISSIONER OF THE LAND OFFICE

The plaintiff brought an action of mandamus against the defendant to recover \$250 which he claimed was due him by reason of expenditures made by him in completing the building and 1917 on account of a rental rebate. There was a trial before the court which resulted in a verdict for the plaintiff in the sum of \$250, and the defendant appeals.

The record discloses that defendant was constructing a building and entered into a lease with plaintiff whereby plaintiff was to rent the premises and use same in his undertaking in business. When the time came for plaintiff to take possession of the building he contended that it was not complete and made complaint of this to the defendant, specifying in writing what repairs plaintiff considered should be done towards the completion of the building so as to make it capable of plaintiff in his business. The defendant took the position that the building was completed in accordance with the terms of the written lease and refused to do any of the work requested by plaintiff, whereupon plaintiff had the work done and paid for it. The court allowed but one item - that of \$100 for work done by plaintiff to ventilate the skylight of the building so that it would conform to the ordinance of the City of Chicago, and he was allowed a rebate of rent for twenty-five days, making \$250.

There were two counts in the declaration, one a special count and the other the consolidated common count. 15

the close of the case plaintiff elected to rely upon the first count alone.

The defendant contends that the building was completed as provided in the lease, which contained the following: "Said building shall be considered completed for the purpose of delivery when floors are finished, roof of building and partitions built; plastering and painting completed; heating system installed and doors hung." There was a dispute in the evidence, and we think it clear that the building was not usable, as it was intended to be, without further work being done after it was turned over by the defendant to plaintiff, and since the defendant refused to make some of the changes requested by plaintiff, and since plaintiff then went ahead with them so that he could use the premises, we think defendant is not in a position to say that plaintiff was not authorized to do the work.

Nor do we think there is any merit in the contention that the special count of the declaration was insufficient. It alleged in substance that defendant was constructing a building and had leased it to the plaintiff; that as the defendant did not complete the building, plaintiff was required to do so in order that the building could be occupied by him, and that plaintiff was required to spend money to have the work done. Nor is there any merit in the contention made that the ordinance of the City of Chicago must be pleaded. That is no longer the law. Sections 1 and 2, pars. 57 and 58, chap. 51, p. 1435, Cahill's 1931 Statutes.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

the close of the case plaintiff elected to rely upon the three counts alone.

The defendant's motion was granted and the case was remanded as provided in the order, which contained the following: "That building shall be considered completed for the purpose of delivery when floors are finished, roof of building and partitions built; plastering and painting completed; heating system installed and doors hung." There was a dispute in the evidence, and we think it clear that the building was not ready, as it was intended to be, at the time the contract was made, and since the defendant refused to make some of the changes requested by plaintiff, and since plaintiff had not moved into them so that he could use the premises, we think defendant is not in a position to say that plaintiff was not excused as to the delay.

Now to us think there is any merit in the contention that the scope of the declaration was insufficient. It alleged in substance that defendant was constructing a building and had failed to do so; that the defendant did not complete the building, plaintiff was required to do so in order that the building could be completed by him, and that plaintiff was required to spend money to have the work done. But in that very merit in the contention, and that the ordinance of the City of Chicago must be complied with. That is no longer the law, Section 1 of Act No. 111, passed May 11, 1907, which is now in effect. The judgment of the Circuit Court of Cook County is

affirmed.

35464

I. S. JOSEPH COMPANY, INC.,
Appellee,

vs.

MIDWEST TRADING AND SECURITIES
CORPORATION,
Appellant.

6 7
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 616²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$825 claimed to be due on account of the defendant's breach of two contracts entered into between the parties for the sale, by plaintiff to the defendant, of spring wheat bran and standard middlings. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for the amount of its claim, and the defendant appeals.

The defense interposed was that the defendant had no dealings with the plaintiff, did not breach any contract and was therefore not liable; that the two contracts were entered into between plaintiff and Frank T. Liddy, who was doing business as Midwest Commercial Company, and it is argued that the evidence sustains defendant's contentions. We think that all of the evidence shows that Frank T. Liddy was not in business for himself but was simply a hired man, working for the defendant company, the orders being taken in the name of the Midwest Commercial Company.

We have this day filed an opinion in the case of Jacobsen against the defendant, the Midwest Trading and Securities Corporation, Number 35352, where the same question was involved. We there analyzed the evidence, which is substantially the same as that in the record before us, and reached the conclusion that Liddy was employed by the defendant Company. We are of the same view in the instant case, and for the reasons stated in the Jacobsen case, the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

DATE: 7-29-1960 FROM: M. I.
TO: Director

RECEIVED THE SECRETARY OF THE ARMY
WASHINGTON, D. C.

RECEIVED: 1964 JAN 14 10 10 AM
FROM THE OFFICE OF THE DIRECTOR

14-
The following is a list of the names of the persons who were present at the meeting of the Board of Directors of the United States Steel Corporation, held on the 14th day of January, 1907, at the Hotel Hamilton, New York City.

The witness testified that he had the telephone call on
 January 23rd, 1934, and that he was very much surprised and
 interested in the fact that the telephone call was from
 Frank E. Lloyd, who was the vice president of the
 West Coast National Bank, and it is noted that the witness
 later told the committee that he had all of the evidence
 from that Frank E. Lloyd was not in business for himself but was
 simply a hired man, working for the National Bank, the witness
 also stated in the name of the West Coast National Bank.

We have this day filed an opinion in the case of Lambert against the defendant, the above Trading and Concessions Company, Inc. There the same question was involved. As there was

[illegible]

35512

JEREMIAH E. O'CONNELL,
Appellant,

vs.

SHERIDAN GLENLAKE BUILDING
CORPORATION, a Corporation, and
ALBERT J. HORAN, Bailiff of the
Municipal Court of Chicago,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 616³

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

May 29, 1931, plaintiff brought an action against the Sheridan Glenlake Building Corporation and Albert J. Horan, bailiff of the Municipal court of Chicago, to try the question of the right of property in a certain Packard automobile. There was a trial before the court without a jury, and a finding and judgment in defendants' favor and plaintiff appeals.

In his statement of claim plaintiff alleged that he was the owner of the Packard automobile levied upon by the bailiff of the Municipal court, by virtue of an execution issued out of the Municipal court in a certain cause wherein the defendant Sheridan Glenlake Building Corporation was plaintiff and W. E. Hayes was defendant, and that the automobile was held by the bailiff.

Plaintiff claimed the automobile by virtue of a chattel mortgage given by Clarice L. Warner, dated November 5, 1930, to secure her note for \$1500, dated November 3, 1930, which note was payable one year after date with interest at 6 per cent. The trial turned on the question of the validity of this mortgage and its validity depended upon whether Clarice L. Warner was a resident of Chicago at the time she executed the mortgage; on this question the evidence was conflicting.

Plaintiff offered in evidence (1) a certificate of title to a Motor Vehicle; (2) Certificate of Registration; (3) the

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Chattel Mortgage and note; and (4) a policy of insurance covering the automobile. The "Certificate of title of a Motor Vehicle" was issued by the Secretary of State of Michigan, dated October 23, 1929, by which the Secretary of State certified that on that date Clarice L. Warner, who lived at Wyandotte, Michigan, had made application for a certificate of title to the Packard car and had stated under oath that she owned the car. The Secretary certified that he had used reasonable diligence in ascertaining "that the facts stated in said application for a certificate of title are true." On the back of this certificate there is a printed blank entitled "Assignment or Transfer of Title," and it is stated that for value received, "I hereby sell, assign, transfer and convey unto _____" and after giving further information it is signed by Clarice L. Warner, so that the assignment by Warner is in blank. Plaintiff also introduced in evidence a "Certificate of Registration" issued by the Secretary of State of Michigan, whereby he acknowledged receipt of the \$24.75 from Clarice L. Warner. The certificate expired December 31, 1930. It is stamped as being issued December 30, 1929. The chattel mortgage is on the ordinary printed form used in Chicago, and is signed by Clarice L. Warner, conveying the automobile to plaintiff, securing her note for \$1500. On the back of the chattel mortgage there is power of attorney executed by Warner, wherein she appoints William E. Hayes her attorney in fact to acknowledge the mortgage before the clerk of the Municipal court of Chicago. Warner's acknowledgment, taken by a notary public of Chicago then follows. There also appears on the back of the chattel mortgage the acknowledgment of it by the attorney in fact, taken by the clerk of the Municipal court of Chicago. This acknowledgment is dated November 6, 1930, and the mortgage was filed for record in the recorder's office November 7, 1930. The insurance policy covering the automobile is

November 7, 1930. The insurance policy covering the automobile is the mortgage was filed for record in the recorder's office of Chicago. This acknowledgment is dated November 8, 1930, and the attorney in fact, taken by the clerk of the Municipal court the back of the chattel mortgage the acknowledgment of it by a notary public of Chicago then follows. There also appears on Municipal court of Chicago. Warner's acknowledgment, taken by new in fact to acknowledge the mortgage before the clerk of the court by Warner, wherein she appoints William E. Kayser her attorney in fact to acknowledge the mortgage before the clerk of the On the back of the chattel mortgage there is power of attorney conveying the automobile to plaintiff, securing her note for \$1200. related to this in Chicago, and is signed by William E. Kayser. issued December 30, 1929. The chattel mortgage is on the ordinary The certificate expired December 31, 1930. It is stamped as being he acknowledged receipt of the \$24.75 from Clarence J. Warner. Registration" issued by the Secretary of State of Michigan, whereby in plain. Plaintiff also introduced a document a "certificate of signed by Clarence J. Warner, as her attorney in fact, and it is conveyed into _____" and after giving further information it is that the same received, "I hereby sell, assign, transfer and Blank entitled "Assignment or Transfer of Title," and it is stated and true." On the back of this certificate there is a printed the facts stated in said application for a certificate of title lied that he had used reasonable diligence in ascertaining "that stated under oath that she owned the car. The Secretary certified for a certificate of title to the Federal car and had Clarence J. Warner, who lived at Wyandotte, Michigan, had made application, by which the Secretary of State certified that on that date issued by the Secretary of State of Michigan, dated October 28, the automobile. The "Certificate of title of a Motor Vehicle" was Chattel Mortgage and note; and (4) a policy of insurance covering

dated April 30, 1930. In it Clarice L. Warner is named as the insured and an Insurance company of Lansing, Michigan, is the insurer. It covers a period of one year ending April 26, 1931, and Mrs. Warner's address is given as 11 Wellesley Road, Royal Oak, Michigan.

Plaintiff testified in his own behalf that he was a practicing lawyer in Chicago for more than forty years; that he had performed legal services for Hayes and that to secure the payment of or to pay these fees, amounting to \$1500, Hayes brought Mrs. Warner into plaintiff's office, where she executed the note and chattel mortgage. He further testified that he had seen the automobile in Chicago and had ridden in it twice; that he knew Mrs. Warner was a resident of Chicago although he did not know where she lived in Chicago; that she was introduced to plaintiff by Hayes; that Hayes lived in Chicago.

Hayes was in court but apparently neither side desired to call him, but at the request of the defendant he was called by the court. Upon being asked where he lived he replied, "Chicago." He was then asked, "What is your address? A. Do I have to give my address?" He then gave his address. He was then asked, "Do you know where she (Mrs. Warner) is living now? A. I refuse to answer that question." The court then ordered him to answer the question and he replied, "I do not know." Then followed an examination of this witness, when plaintiff stated, "I don't mind saying, if it is proper, she (Mrs. Warner) called me on the telephone today. She is in Chicago." This is substantially all the evidence in the record. Why the bailiff of the court should levy on the automobile which it was claimed belonged to Mrs. Warner, on account of a judgment rendered against Hayes, is in no way explained.

dated April 30, 1930. It is signed L. Warner is named as the

issued and an insurance company of Lansing, Michigan, is the

insured. It is a policy for \$10,000.00, dated April 30, 1930.

and the policy is signed as given as is testified to, being now

Michigan.

Witness testified in his own behalf that he was a

practicing lawyer in Chicago for more than forty years; that he

had performed legal services for Hayes and that to secure the

payment of it he had been told, according to him, by

Edward Mrs. Warner into Plaintiff's office, where she executed

the note and chattel mortgage. He further testified that he had

seen the automobile in Chicago and had driven in it; that it

then Mrs. Warner was a resident of Chicago at the time he did not

know where she lived in Chicago; that she was introduced to him

first by Hayes; that Hayes lived in Chicago.

Hayes was in court and subsequently advised him that

to call him, but at the request of the defendant he was called by

the court. The court then asked him if he lived in Chicago.

He was then asked, "What is your address?" He I have to give

my address." He then gave the address. He was then asked, "Do you

know where she (Mrs. Warner) is living now?" A. I refuse to

answer that question." The court then ordered him to answer the

question and he replied, "I do not know." Then followed an ex-

amination of this witness, when Plaintiff stated, "I don't mind

saying, it is in proper, she (Mrs. Warner) called me on the

telephone today. She is in Chicago." This he substantiated all

the evidence in the record. Why the bill of the court should

levy on the automobile when it was claimed belonged to Mrs. Warner

on account of a judgment rendered against Hayes, is in no way

explained.

Under the law, if Mrs. Warner was a resident of Michigan at the time the mortgage was executed, she could not validly acknowledge a chattel mortgage before the clerk of the Municipal court of Chicago unless the automobile was kept here. She would have to do so before a proper officer in Michigan. Secs. 1, 2 and 4, chap. 95, Cahill's Statutes. Sec. 1 provides that a chattel mortgage to be valid as to third parties must be acknowledged. Sec. 2 provides that if a chattel mortgage is made by one who is a non-resident of this State, it must be acknowledged "before any officer authorized by law to take acknowledgments of deeds." That section then sets forth the forms of acknowledgment, one of which is that if the acknowledgment is made by "a resident insert the words 'and entered by me.'" Sec. 4 provides that a chattel mortgage to be valid must be filed for record in the office of the recorder of the county in which the mortgagor resides at the time the mortgage is executed, "or in case the mortgagor is not a resident of this State, then in the county in which the property is situated and kept."

We think the questions whether Mrs. Warner, at the time she executed the mortgage, was a resident of Michigan or Illinois, and whether the automobile was kept in Chicago, were questions of fact for the trial court, and upon a careful consideration of all the evidence in the record we are unable to say that his finding to the effect that she was not a resident of Illinois is manifestly against the weight of the evidence. All of the documents offered in evidence, as above stated, show that Mrs. Warner was a resident of Michigan. It is true they were all executed before November 5, 1930, the date of the mortgage, but

Under the law, if Mrs. Warner was a resident of Michigan at the time the mortgage was executed, she could not validly acknowledge a chattel mortgage before the clerk of the Municipal Court of Chicago unless the automobile was kept here. She would have to go to before a proper officer in Michigan. Sec. 1, 2 and 4, chap. 95, Cahill's Statutes. Sec. 1 provides that a chattel mortgage to be valid as to third parties must be acknowledged. Sec. 2 provides that if a chattel mortgage is made by one who is a non-resident of this State, it must be acknowledged "before any officer authorized by law to take acknowledgments of debts." That section then sets forth the forms of acknowledgment one of which is that if the acknowledgment is made by "a resident of this State" and entered by me." Sec. 4 provides that a chattel mortgage to be valid must be filed for record in the office of the recorder of the county in which the mortgagor resides at the time the mortgage is executed, "or in case the mortgagor is not a resident of this State, then in the county in which the property is situated and kept."

We think the evidence shows that at the time she executed the mortgage, Mrs. Warner was a resident of Michigan or Illinois, and whether the automobile was kept in Chicago, were questions of fact for the trial court, and upon a careful consideration of all the evidence in the record we are unable to say that his finding to the effect that she was not a resident of Illinois is manifestly against the weight of the evidence. All of the documents offered in evidence, as above stated, show that Mrs. Warner was a resident of Michigan. It is true they were all executed before November 5, 1930, the date of the mortgage, but

there are many circumstances as to Mrs. Warner's address at that time that could have easily been explained by calling Mrs. Warner, who was in Chicago on the day of the trial, as testified to by plaintiff. But she was not called. Moreover, the witness Hayes was evasive as to where she lived. When he was first asked as to her residence he, in effect, refused to answer and when the court ordered that he do so, his reply was that he did not know where she lived. It is true that plaintiff testified that Mrs. Warner lived in Chicago, but it is obvious that this was only hearsay, because he later testified that he did not know her Chicago address.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

35549

HERMAN P. WEISS,
Appellee,

vs.

NORMAN R. HERLIHY et al.,
Appellants.

8 7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 616⁴

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse a decree entered in a foreclosure suit, their contentions being that they would be required to pay \$312 under the guise that it was a commission for obtaining the loan, when as a matter of fact it was mere usury; that the allowance of \$375 fees for complainant's solicitor was unwarranted; that the complainant was not the real owner of the notes in foreclosure; that they belonged to Edwin H. Manassee.

The record discloses that on January 5, 1929, the defendant, Norman R. Herlihy, signed an application for a loan to H. Manassee Sons Investment Co. of \$2400. By the application Herlihy authorized the Investment company to "negotiate a loan" of \$2400, which would be evidenced by 24 notes payable monthly, \$50 a month for the first 23 months and \$1250 the 24th month, at 6 per cent per annum, and in which application Herlihy agreed to pay the Investment company 13 per cent commission for procuring the loan. The loan was to be secured by a mortgage on real estate. It was made in the regular way, trust deed and notes executed and recorded, and Herlihy was given \$2088, the Investment company retaining the \$312 as commission, in accordance with the application.

The evidence tends to show that before the note and trust deed were executed by Herlihy, Manassee, of the Investment company, had obtained a purchaser named Max W. Petasque, for the mortgage, and after obtaining this purchaser the Herlihys executed

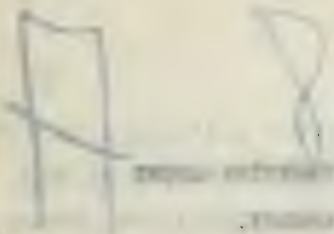
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By this report the defendant seeks to reverse a decision rendered in a previous case, which conclusion being that they were not required to pay \$1000 when the price was a certain amount, when as a matter of fact it was not necessary; that the amount of \$1000 was for commission's solicitor was unnecessary; that the commission was not the real owner of the notes in question; that they belonged to John H. ...

The report further states that on January 1, 1910, the defendant, ... applied for a loan to ... By the application ... the investment company to "negotiate a loan" of \$1000, which would be evidenced by 10 notes payable monthly, \$100 a month for the first 10 months and \$1000 the 11th month, at a rate of 6 per cent per annum, and in which application having agreed to pay the investment company 10 per cent commission for procuring the loan. The loan was to be secured by a mortgage on real estate. It was said in the report that, "this loan was secured and ... and having no other assets, the investment company ... this an occasion, in connection with the application.

The statement that to show that before the note and trust had been executed by ... of the investment company, had obtained a promissory note from H. ... for the purpose, and after obtaining this document the ...

the trust deed and notes, the deal was closed in the ordinary way and Petacque paid the Investment company \$2404 for the notes and trust deed. The cancelled check for this amount is in the record. Some of the notes were paid by the Merlihy as they fell due. Default was then made and on December 4, 1939, the bill was filed in which it was alleged that Weiss was the owner of all the notes, and that he had elected to declare all of the indebtedness due. There is evidence to the further effect that when Merlihy made default in payment of the monthly notes, Petacque called on the Investment company from whom he had purchased the paper and demanded his money, which, apparently, was in accordance with the terms of the agreement when he purchased the papers, and that Manassee then obtained Weiss, who was Manassee's cousin, to buy the notes and trust deed, and said he would not be required to pay for all of them at once, but only in monthly instalments as the notes came due. This is the substance of the material evidence on two of the points in controversy.

We have been unable to find any evidence that the Investment company acted in any other way than as a broker in the matter. The money was loaned by Petacque and while it is somewhat peculiar that Weiss would buy notes some of which were in default, and pay the face value of them, we are not authorized to reverse a decree merely on suspicion or surmise. The master saw and heard the witnesses and found in favor of the complainant; his finding was sustained by the chancellor, and unless we are able to say that the finding is manifestly against the weight of the evidence, we are not warranted, under the law, in disturbing the decree on this ground. The same is true as to whether all of the notes were owned by Weiss prior to the filing of the suit. They are all in the record and we think we would not be warranted in disturbing the decree on the ground that there might be considerable suspicion

the times when and where, the fact was closed in the ordinary way
and returned with the investment company \$1000 for the notes and
trust deed. The cancelled check for this amount is in the record.
Some of the notes were paid by the company as they fell due. The
fact was then made and on December 4, 1935, the bill was filed in
which it was alleged that Weiss was the owner of all the notes, and
that he had elected to receive all of the interest on the notes. There
is evidence to the effect that when receiving such details
in payment of the monthly notes, the company called on the investment
company from whom he had purchased the paper and received his
money, which, apparently, was in accordance with the terms of the
agreement. When he purchased the notes, and that business then
obtained Weiss, who was business's cousin, to pay the notes and
trust deed, and said he would not be required to pay for all of
them at once, but only in monthly installments as the notes were
due. This is the substance of the material evidence on two of
the points in controversy.
We have been unable to find any evidence that the in-
vestment company ever is not shown by the fact that it is
evident. The money was loaned by the company and Weiss is a co-owner
possessor that Weiss would pay notes some of which were in default,
and pay the face value of them, we are not authorized to receive a
return which is required to be made. The notes are not paid
the witnesses and taken in favor of the complainant; his finding
was sustained by the chancellor, and unless we are able to say that
the finding is manifestly against the weight of the evidence, we
are not warranted, under the law, in disturbing the decree on this
ground. The case is thus as to whether all of the notes were owned
by Weiss prior to the filing of the suit. They are all in the
possession and control of Weiss and it appears to be established that
there is no ground that there might be considerable evidence

attached to the method by which Weiss claims to have purchased the notes.

As to the \$375 allowed to complainant as and for his solicitor's fees. Complainant's solicitor testified that he was a practicing attorney in Chicago and testified in considerable detail as to what service he performed in preparing, instituting and trying the foreclosure suit, and that the usual, customary and reasonable charges for the service was \$375. There was no evidence to the contrary, and upon a consideration of all the evidence in the case we are of the opinion that we would not be warranted in holding that the allowance of solicitor's fees was unwarranted.

We are further of the opinion that the allegations of the bill were entirely sufficient to warrant the allowance of solicitor's fees.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

affirmed in the opinion of the court in this case.
The court.

As to the \$275 alleged to be paid for his
collection's fees, the court said that in the
proceedings attorney is entitled and entitled to consider the
bill as he was entitled to be paid in preparing, collecting and
returning the necessary bill, and that the usual, necessary and
reasonable charges for the service was \$275. There was no
issue as to the necessity, and upon a consideration of all the
facts in the case as set out in the opinion that he was not to
be awarded in addition the expenses of collection's fees was
denied.

We are further of the opinion that the allowance
of the bill was entirely sufficient to return the amount of
collection's fees.

The decree of the Superior Court of Cook County is
affirmed.

WILLIAM J. ...

Respectfully submitted, W. J. ...

35558

DR. THEO. SCHAPS,
Appellant,

vs.

EMMA FLECK,
Appellee.

9 7
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 617'

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff, a practicing physician and surgeon, brought an action against the defendant to recover \$102 for professional services rendered by him to defendant's minor son. It is alleged in the amended statement of claim that the suit is predicated on the "Family Necessaries Act." There was a trial before a Judge and a jury and a verdict in defendant's favor, from which plaintiff appeals.

The record discloses that Charles Fleck and his wife, the defendant, Emma Fleck, were passing the summer at Lake Geneva, Wisconsin, when their minor son, Charles Fleck, Jr., was injured; that plaintiff was called from Chicago to treat the son and went to Lake Geneva on two occasions, for which he made a charge of \$100. Afterwards the son called at plaintiff's office in Chicago, for which plaintiff made a charge of \$2. The defense interposed was that the services were to be rendered gratuitously; that plaintiff's wife and the defendant were cousins and that plaintiff stated there would be no charge for the services. The plaintiff denied this and the question on this disputed point was submitted by an express instruction to the jury. The court instructed the jury orally and told them that the defense was that the services were gratuitously rendered; that this was an affirmative defense which the defendant was required to prove by a preponderance of the evidence and that if she did so, their verdict should be in her favor; but if, on the contrary, she had not sustained her

affirmative defense by a preponderance of the evidence, or if the evidence was evenly balanced, then they should find for the plaintiff. The jury found in favor of the defendant, believing her version of the matter. No complaint was made to this instruction by counsel for the plaintiff, as the rules of the Municipal court require and of which we now take judicial notice. Secs. 1 and 2, chap. 51, p. 1435, Cahill's 1931 Statutes. That rule provides: "Objections to the giving or refusing of oral instructions to the jury must be specific and must be made immediately upon the conclusion of the charge and before the jury retire."

Complaint is made that the court erred in refusing to permit plaintiff to testify to the contents of a letter written by him to the defendant. Notice to produce this letter was served on counsel for defendant but a few minutes before the case went to trial, and upon objection by counsel for defendant the court refused to permit plaintiff to introduce secondary evidence of the contents of the letter. Under the circumstances, we think it was discretionary with the court, and we cannot say that this discretion was abused.

Complaint is also made that counsel for the defendant made prejudicial statements in his argument to the jury. In the argument counsel for defendant stated, in substance, that the defendant was a married woman living with her husband, who was not sued in the case; that this indicated something peculiar; "Why this doctor should single out this wife and not the husband, and the husband who ordinarily pays bills for the family? Why, just think of that! Isn't there something peculiar in this lawsuit that you don't know, that you can imagine?" And again: "Now, another fact in this case: These services were rendered in 1926 and now they sue." (The suit was brought December 13, 1930.) "Why, if he had any legitimate claim don't you think he would have taken action

affirmative defense by a preponderance of the evidence, as it was
evidence was evenly balanced, then they should find for the
plaintiff. The jury found in favor of the defendant, holding
non-vesting of the matter. It concluded that there was no
lien by contract for the plaintiff, as the rules of the National
Court require and of which we now take judicial notice. See, I
and 2, 100, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826,

against this woman long before?" Complaint is also made to other parts of counsel's argument, which we have considered, but we think there is nothing in the argument that would warrant us in disturbing the judgment. The issue was very plain and simple and easily understood by the jury. Nor can we say that the verdict is manifestly against the weight of the evidence. It appears that the wife of plaintiff was a cousin of the defendant and that after the services were rendered by plaintiff there was some family trouble, which need not be adverted to here, which might have led the jury to believe that plaintiff had not intended to charge for the services when he rendered them but had later changed his mind.

A further point is made, that even if defendant's version of the matter were true, plaintiff's statement that he would make no charge for the services, was a promise without consideration and unenforceable. We think plaintiff is not in a position to urge this point because when the court specifically instructed the jury as above stated, no objection was made by counsel for plaintiff to the instruction and no suggestion made that the defense was unavailing because there was no consideration for plaintiff's promise. Nor was it reversibly erroneous to refuse to instruct the jury, as requested by plaintiff's counsel, that plaintiff had a right to bring his suit at any time within five years from the time services were performed, because the sole issue involved was submitted specifically by the court in oral instructions, so that the question of the claim being barred by the Statute of Limitations was clearly out of the case. By given instructions we think the jury understood the matter clearly.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

against this woman last before?" Complainant in this case is also
part of counsel's argument, which we have considered, and we think
there is nothing in the argument that would warrant us in disre-
gard the judgment. The issue was very plain and simple and easily
understood by the jury. Nor can we say that the verdict is mani-
festly against the weight of the evidence. It appears that the
wife of plaintiff was a cousin of the defendant and that after the
testimony was rendered by plaintiff there was some family trouble,
which need not be adverted to here, which might have led the jury
to believe that plaintiff had not intended to change for the ser-
vices which he rendered them but had later changed his mind.
A further point is made, that even if defendant's ver-
dict of the matter were true, plaintiff's argument that he would
make no charge for the services, was a promise without considera-
tion and unenforceable. We think plaintiff is not in a position to
urge this point because when the court specifically instructed the
jury as above stated, no objection was made by counsel for plain-
tiff to the instruction and no suggestion made that the defense
was unavailing because there was no consideration for plaintiff's
promise. Nor was it properly grounds to refuse to instruct the
jury, as requested by plaintiff's counsel, that plaintiff had a
right to bring his suit at any time within five years from the time
services were rendered, because the rule stated was not
misled specifically by the court in such instructions, so that the
question of the claim being barred by the Statute of Limitations
was clearly out of the case. If given instructions as above the
jury understood the matter clearly.

The judgment of the Circuit Court of Chicago is

35083

CHICAGO ENGINEER SUPPLY COMPANY,
a Corporation,

vs.

Appellee,

WILLIAM J. SELBIE, (WILLIAM M.
BURNS not appealing), CHARLES
E. KREBS and E. DELORA KREBS,
Individually, and CHARLES E. KREBS
and E. DELORA KREBS as Copartners
doing business under the name of
KREBS MANUFACTURING COMPANY,
Appellants.

10 7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.
IN CHANCERY.

264 I.A. 617²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant's bill charged defendants with conspiracy and unfair competition, and asked for an injunction and an accounting. Answers were filed and the cause referred to a commissioner to take evidence and report with his findings. The commissioner recommended a decree in accordance with the prayer of the bill, and after hearing, upon objections and exceptions filed, the report was confirmed by the chancellor and a decree accordingly entered, from which defendants (except William M. Burns) appeal. The decree awarded an injunction and damages against defendants in the sum of \$27,517, and a further accounting.

The controversy is concerned with a metal tube cleaner sold by complainant, which business complainant contends the defendants conspired to take from it by means of wrongful acts amounting to unfair competition. Defendants deny wrongful acts and contend that they were engaged in the tube cleaning business in competition with complainant and other concerns; that while defendants William J. Selbie and William M. Burns were former employees of complainant, the knowledge acquired by them while thus employed was not secret and confidential.

It would make this opinion much too long to attempt a

full narrative of the events shown by the record. The testimony covers over 2200 pages. After considering the evidence we are of the opinion that the findings of the commissioner were justified.

Complainant is an Illinois corporation with its principal place of business in Chicago. Since January, 1889, it has been engaged in the business of selling tools, valves, pipes and allied products. Since sometime prior to 1914 it has also included in its business the sale of tube cleaners, parts and accessories therefor, acting as the agent for other concerns manufacturing such cleaners. In 1920 complainant began to market its own tube cleaner and parts called the "CESCO" tube cleaner. This name is made up of the first letter of each word in complainant's corporate name and was registered as complainant's trade mark pursuant to the Federal statutes. The device was not patented and was sold in competition with other tube cleaners more or less similar in character. Samples of the cleaner were in the record, but as there is no controversy over the device itself, we shall omit a description. Complainant did its tube cleaner business with consumers directly or through agents which it established from time to time in various parts of the country, and both consumers and agents were also solicited by complainant by means of catalogues, letters and by traveling agents. The agents were paid a commission on their sales.

Defendant Selbie was first employed by complainant in 1904 and with one slight intermission continued to be employed by it until May 31, 1927. He first was a general salesman and about December, 1924, became the general sales manager, devoting most of his efforts to developing the tube cleaner business of complainant outside of the Chicago territory. Defendant Burns entered complainant's employ in 1902 and left for a short time

The evidence shows that the defendant was present at the scene of the crime and that he was the person who fired the shot which killed the victim.

001 010 00000000 00000000 00000000 00000000 00000000 00000000 00000000 00000000

Actual date of business in Chicago. Since January, 1935.

and said it was a very good idea. He said he would like to see it.

included in the business the only at these elements, parts and accessories

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is made up of the 12th letter of which word is consistently seen
first element and yields series for "12/100" like sequence. This may

1. The following information was obtained from the records of the Federal Bureau of Investigation, Washington, D. C., on the subject of the above captioned case:

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-11-2010 BY 60322 UCBAW/STP

There is no controversy over the device itself. We shall only

CONFIDENTIAL

time to time in various parts of the country, and both companies

and agents were also solicited by assignment by means of letters, letters and by traveling agents. The agents were paid a

...no relation on their part.

Approved by the Board of Directors on this 1st day of January, 1911.

On 11 May 1967, the first of a series of general elections was held in the United Kingdom. The results of the election were as follows:

...and at his request is providing the first eleven chapters of

© 2002 Blackwell Science Ltd *Journal of Internal Medicine* 252: 103–110

but returned in 1914 and remained with complainant until May 31, 1927. He and Selbie virtually had full charge of the tube cleaner business.

Complainant did not manufacture its cleaners but, commencing about June, 1922, and continuing until June, 1927, they were manufactured by the Krebs Manufacturing Company, a partnership composed of Charles E. Krebs and E. Delora Krebs, who are defendants here. The tubes, parts and accessories were, however, manufactured under the general inspection and direction of complainant and by means of tools, dies and jigs which were the exclusive property of complainant and were furnished to the Krebs Company for the sole purpose of making complainant's tube cleaners. The Krebs Company manufactured no other tube cleaners prior to June, 1927.

A large amount of complainant's business was the sale of repair parts, and Burns and Selbie, at the suggestion of complainant's president, prepared and kept a card index consisting of about 434 cards filed alphabetically. On each card were the name and address of a customer and other information as to cleaners and parts ordered from time to time by the customer. Through these cards complainant was able to check orders coming from customers, so that they could be filled promptly and errors avoided. The cards also enabled complainant to carry on its mail order business. They were kept in a box on complainant's premises, but were virtually under the exclusive control of Selbie and Burns. These cards were of great value to complainant and, as the commissioner found, if a competitor gained possession of them, would be of inestimable value to such competitor.

During the period of employment of Burns and Selbie they occupied positions of trust and confidence, and by reason of the nature of their work had knowledge of the names and addresses

The statement is that the complaint was received about May 11, 1937. He and Solbie virtually had full charge of the case at that time.

Complaint was not made until its receipt was made, concerning about May 11, 1937, and continuing until about May 15, 1937, when it was received by the State Sanitary Department, a partnership composed of Charles E. Hays and E. Hays, Jr., who are partners. The above, facts and circumstances were, however, ascertained under the general inspection and direction of complaint and by means of tools, after which were the exclusive property of complaint and were furnished to the State Sanitary Department for the sale of the complaint. The State Sanitary Department was not aware of the complaint until it was received. Complaint was not received on other case elsewhere prior to June, 1937.

A large amount of complaint was received from the sale at regular price, and Hays and Solbie, at the suggestion of complaint's president, property and kept a card index consisting of about 100 cards filed alphabetically. On each card were the name and address of a customer and other information as to complaint and cards ordered from time to time by the customer. Through these cards complaint was able to check orders against the customer, so that they could be filed promptly and errors avoided. The cards also enabled complaint to carry on its mail order business. They were kept in a box on complaint's premises, but were virtually under the exclusive control of Solbie and Hays. These cards were of great value to complaint, and the commission found, if a competitor gained possession of them, would be of incalculable value to him.

During the period of employment of Hays and Solbie they occupied positions of trust and confidence, and by reason of the nature of their work had knowledge of the names and addresses

of complainant's customers and agents and general information as to their needs and dates on which orders had been filed. All of this information was kept secret by complainant from its competitors. The tube cleaner business grew slowly but by 1925 it had become a profitable business and complainant had gained the good will of a large group of agents and consumer customers, and the Krebs Company was uniformly filling complainant's orders promptly.

The evidence shows that about December, 1926, Selbie and Burns and the Krebs Company entered into a conspiracy to secure for the Krebs Company and Selbie and Burns the "CESCO" tube cleaner business of complainant. The Krebs Company agreed with Selbie and Burns that it would go into this business and finance it for the benefit of all four defendants and would manufacture the same tube cleaner it had theretofore manufactured only for complainant.

The commissioner found and the evidence shows that in pursuance of this conspiracy, beginning about February 1, 1927, the Krebs Company commenced to delay and put aside the manufacturing of "CESCO" tube cleaners and accessories for complainant and thereafter used the tools, dies and equipment belonging to complainant to make up a supply of tube cleaners to be used and sold by the Krebs Company in competition with complainant until complainant obtained the return of said tools and equipment by writ of replevin. On or about June 1, 1927, the Krebs Company for the first time engaged in the business of manufacturing and selling tube cleaners on its own account.

Selbie, while still in complainant's employ and while ostensibly traveling in its behalf, during the period between December, 1926, and June, 1927, falsely represented to certain customers of complainant that it was about to go out of the tube cleaner business and that defendants were going to take over this business; that

of complainant's customers and agents and generally information as to their needs and dates on which orders had been filled. All of this information was kept secret by complainant from its competitors. The tube element business grew slowly but so that in 1937 it had become a profitable business and complainant had gained the good will of a large group of agents and numerous customers, and the tube company was uniformly filling complainant's orders promptly.

The evidence shows that about December, 1936, Soltau and Green and the tube company entered into a conspiracy to secure for the tube company and Soltau and Green the "know" tube element business of complainant. The tube company agreed with Soltau and Green that it would go into this business and finance it for the benefit of all four defendants and would manufacture the same tube element it had heretofore manufactured only for complainant.

The commission found that the evidence shows that in pursuance of this conspiracy, beginning about February 1, 1937, the tube company commenced to delay and not make the manufacturing of "know" tube elements and accessories for complainant and thereafter used the tools, dies and equipment belonging to complainant to make up a supply of tube elements to be used and sold by the tube company in competition with complainant's existing business. On or about June 1, 1937, the tube company for the first time engaged in the business of manufacturing and selling tube elements on its own account.

Soltau, while still in complainant's employ and while ostensibly traveling in the behalf, during the period between December, 1936, and June, 1937, fraudulently transferred to certain individuals of complainant that it was about to go out of the tube element business and that defendants were going to take over this business; that

complainant was unable to fill orders and that defendants would be the legitimate successors of this business. By means of these false representations Selbie induced complainant's customers to believe that complainant was about to give up its tube cleaner business and caused customers to hold up orders and to later give them to the Krebs Company. Selbie also, before leaving complainant's employ, arranged with ten of complainant's sales agents to act as representatives and agents of the Krebs company and to discontinue their connection with complainant and to purchase from the Krebs company all tube cleaners that might be ordered through Selbie.

Complainant, not knowing of the conspiracy, increased the salaries of Selbie and Burns during the period between December, 1926, and June, 1927, and urged them to greater efforts to build up an increased business. There was some argument between complainant's president and Selbie over an unsatisfactory report of a trip made by Selbie, whereupon Selbie and Burns on May 31, 1927, joined in one written resignation from complainant's company and left its employ on the same day and on the next day entered the employment of the Krebs company. It is not without significance that, when Selbie and Burns arrived at the office of the Krebs company on the morning of June 1st, Selbie greeted Mr. Krebs with the salutation, "Lafayette, we are here!"

Thereafter Selbie and Burns made to complainant's agents and customers and to the trade generally the same false representations and solicited trade which complainant had theretofore enjoyed. Selbie being personally known to most of complainant's customers, they believed his representations to the effect that complainant was no longer in the tube cleaner business.

Selbie and Burns also represented to complainant's customers and agents that the Krebs company was connected with the complainant and selling complainant's products outside complainant's

complaint was made to Will Brown and that defendant would be the legitimate successors of his business. By means of these false representations Balbis induced Brown to transfer to him the business and caused defendant to give up its sole claim to the trade company. Balbis also, before leaving defendant's employ, arranged with him to assign to Balbis all the rights and interests of the trade company and to discontinue their connection with defendant and to purchase from the trade company all the claims that might be asserted through Balbis. Defendant, not knowing of the conspiracy, increased salaries of Balbis and Brown during the period between December, 1926, and June, 1927, and urged them to greater efforts to build up an increased business. There was some argument between defendant and Balbis over an unauthorized receipt of a trip made by Balbis, whereupon Balbis and Brown on May 21, 1927, joined in the writing of a letter to defendant's company, and left the matter to defendant and to the fact that the defendant at that time was not aware of the conspiracy. It is not without significance that, when Balbis and Brown arrived at the office of the trade company on the morning of June 1st, Balbis greeted Mr. Brown with the salutation, "Hello, we are here."

Defendant Balbis and Brown made no attempt to conceal their relationship and statements and to the trade company the same false representations and solicited trade which defendant had theretofore enjoyed. Balbis being personally known to most of defendant's customers, they believed his representations as to the effect that defendant was no longer in the same business.

Balbis and Brown also represented to defendant's customers and agents that the trade company was connected with the defendant and selling defendant's products outside defendant's

Chicago territory, and thus induced a large number of complainant's customers and agents to cease ordering from complainant and instead to buy tube cleaners from the Krebs company. There was evidence that on the day Selbie and Burns left complainant's employ, and on the next day, they sent telegrams and letters to at least six or seven former agents of complainant located outside of Chicago, directing them to hold all orders for the tube cleaners, and that Selbie would advise them later. In some of the telegrams Selbie advised these people that he would be communicated with at the address of the Krebs company.

Beginning about June 5, 1927, Selbie called upon at least ten of complainant's former agents in other cities and by means of false representations induced them to cease their agency with complainant and to become the agents of defendants.

Furthermore, while still in complainant's employ, Burns took from the files of complainant and kept for the use of defendants certain blue prints and drawings of complainant used for manufacturing and cataloguing complainant's tube cleaners and without the knowledge or consent of complainant took the card index above described and retained it for a time, returning it surreptitiously, but while in his possession Burns made copies of the cards, thereby acquiring the detailed data contained thereon, a portion of which was strictly confidential to complainant's business. The commissioner found that since that time defendants have continued to use the information thus gained.

Also Burns took from complainant's premises a number of complainant's catalogues and used them in connection with the Krebs Manufacturing Company and in competing with complainant and in getting its business. In September, 1927, the Krebs company prepared a catalogue of at least 5,000 copies, using pictures, cuts

and representations of the tube cleaners, parts and accessories taken from complainant's catalogue and caused the pictures and descriptive matter to be copied into the Krebs catalogues. Complainant's catalogue was also simulated in size and make-up. The Krebs catalogue also contained misleading statements tending to deceive customers and the trade generally into believing that the Krebs company had been manufacturing for many years a tube cleaner on its own behalf, and also representations causing customers to believe that defendants were the successors of complainant in its tube cleaner business. In many other details defendants used unfair means in attempting to secure for themselves complainant's business. The commissioner concluded that the acts of defendants constituted unfair and unlawful acts of competition with complainant, causing great confusion among complainant's customers and its trade generally and causing complainant to lose a part of its tube cleaner business; and that complainant has suffered severe damages and loss of profits by reason of these acts.

There is little, if any, controversy as to the law applicable to such a state of facts. While there is nothing wrong in an employee making arrangements during his employment to engage at the termination thereof in the same business as his employer and in competition with him (Johnson Manfg. Co. v. Johnson Skate Co., 313 Ill. 106), yet the right of an ex-employee to engage in a rival business does not include the right to appropriate the trade secrets and confidential information of his former employer. In Mechem on Agency, section 1209, vol. 1, 2nd ed., the general principle is thus stated:

"*** an agent will not be permitted, during the continuance of his agency, to take advantage of the knowledge of the principal's situation, needs, or desires, which knowledge he acquires by reason of his employment and in a confidential capacity, to compete with or undermine his principal's interest by acquiring

and representations of the same character, false and misleading
 nature, that defendant's conduct and caused the plaintiff and his
 private matter to be copied from the trade catalogue. Defendant
 and his associates are also charged in this regard. The facts
 defendant has obtained misleading statements leading to deceptive
 answers and the trade generally into believing that the trade con-
 tain had been manufacturing for many years a tube element as the
 result, and also representations causing confusion to believe that
 defendant was the successor of complainant in the tube element
 business. In many other details defendant used unfair means in
 attempting to secure the business complainant's business. The
 defendant's conduct was not only in violation of the law but also
 fair and honest acts of competition with complainant, causing
 great damage and loss to complainant's business and his wife's econ-
 omy and causing complainant to lose a part of his tube element
 business; and that complainant has suffered severe damage and loss
 by profits by reason of these acts.

There is little, if any, controversy as to the law ap-
 plicable to such a case. It is well settled that it is
 an unlawful act to engage in the same business as his employer and in
 competition with him (Johnson v. Johnson, 100 Cal. 213).
 The law is clear that an employer is entitled to a
 business does not include the right to appropriate the trade secrets
 and confidential information of his former employer. In such a
 case, section 170, Cal. Civ. Code, and section 171, Cal. Civ. Code
 stated:

"One who has been employed by another, and who has obtained access to the confidential information of the employer, shall not, after the termination of his employment, use such information in his own business or in the business of another, or in any way disclose the same to another."

for himself that which the principal deems it necessary or desirable to acquire for his own interest or protection."

In American Cleaners & Dyers v. Foreman, 252 Ill. App.

122, we said:

"All of the authorities seem to agree that if the employee under such circumstances surreptitiously copies the names and addresses of his employer's customers while he is employed, and takes such lists with him, he will be enjoined from soliciting the customers for his new employer."

To the same effect are Messenger Pub. Co. v. Mokstad, 257 Ill. App.

161 (certiorari denied by Supreme court.); Boylston Coal Co. v.

Rautenbush, 237 Ill. App. 550; Krueger v. Lundeen, 211 Ill. App. 320.

The decree of the chancellor does not interfere with the rights of defendants to engage in competition with complainant in the tube cleaner business. It finds that complainant is entitled to the custom and trade of certain persons, its former customers, as against defendants for the reason that defendants had been guilty of making false and fraudulent representations concerning complainant to such persons. It can hardly be controverted that defendants were carrying on a series of unfair trade practices against complainant, and the decree enjoining defendants from making any further false representations that complainant is going out of business or is unable to fill orders for tube cleaners or that defendants have taken over complainant's business, was justified from the record.

Undoubtedly, as contended for by defendants, the burden of proof was upon complainant to prove the conspiracy as charged by the bill of complaint. The Chicago Tribune Co. v. Thompson, 342 Ill. 503. But we are of the opinion that the proof adduced met this requirement.

Defendants' brief asserts that there is no evidence that defendants Charles E. Krebs or E. Delora Krebs had any part in the conspiracy or authorized the making of the alleged misrepresentations. There was evidence sufficient to connect these de-

for himself that when the principal agent is necessary to
beholden to himself for his own interest or protection.

In William v. Smith, 100 N. H. 100.

100, we said:

"All of the authorities seem to agree that in the absence
under such circumstances a reasonably certain rule may be
admitted that a principal's agent is not to be held liable
for acts done by him, as will be evident from following
the authorities in this case."

In the case cited we found the following:

(1) William v. Smith, 100 N. H. 100.

William v. Smith, 100 N. H. 100.

The essence of the complaint does not interfere with

the rights of defendants to engage in competition with complainant
in the same business. It finds that complainant is entitled
to the entire and entire of certain business, the entire business,
against defendant for the reason that defendant has been guilty of
wrong doing and fraudulent representations and has been guilty of
fraudulent representations. It is found that defendant is
entitled to a share of certain business and certain business
and the essence of defendant's defense from making any further false
representations that complainant is going out of business or is
going to still leave the business of defendant's business
taken over defendant's business, was found that the business
defendant, as defendant was by defendant, the business

and of proof was upon complainant to prove the conspiracy as charged
by the bill of complaint. The William v. Smith, 100 N. H. 100.
100, 100. But we are of the opinion that the proof adduced was
this requirement.

Defendant's 'false' assertions that there is no evidence
that defendant's business is taken over by defendant's business
in the conspiracy or authorized the making of the alleged
representations. There was evidence sufficient to connect these

defendants with the conspiracy. Selbie told certain parties that Krebs had asked Burns and himself to come over with the Krebs Manufacturing company and had agreed to finance the proposition; this, while Selbie was employed by complainant. The slowing up of the Krebs company in manufacturing cleaners for the use of complainant and the fact that it manufactured a large number of cleaners while in possession of complainant's dies and equipment which were not for complainant, indicate that Krebs and Mrs. Krebs must have been parties to the scheme of obtaining complainant's business.

As to Mrs. Krebs it is sufficient to say that, although she may not have taken any active part in the conspiracy, she as a partner was liable for the fraud committed in the course of the partnership business. She did not testify in the case. In Consumers Co. v. Parker, 227 Ill. App. 552, it was held that each partner is liable for the other and each partner is agent for the other and is chargeable with a fraud, actual or constructive, as well as the knowledge of the other. To the same effect is Kraft v. Greenough, 175 Ill. App. 124, where many cases are cited. In Strang v. Bradner, 114 U. S. 555, an action was filed against the members of a partnership to recover damages on account of the fraud and deceit practiced by one of the partners, and the court held that the fraudulent representations of one of the partners would be imputed to the others. Many other cases might be cited. There can be but little controversy over the fact that the card index and its contents were secret and confidential information belonging to complainant exclusively. When defendants surreptitiously purloined and used them, they were guilty of fraud from which a court will not allow them to profit.

The copying from complainant's catalogue by defendants amounted to unfair competition. Practices similar to this have been condemned frequently in the courts. Merchants' Syndicate

...with the conspiracy. ...
...had asked ... and ...
...had agreed to ... the prosecution; ...
...was employed by ... The ...
...in ... for the use of ...
...it manufactured a large number of ...
...of ... and equipment which were not
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As to ... it is sufficient to say that, ...
... had not taken any active part in the conspiracy, ...
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... where many cases are cited. In ...
... an action was filed against the members of a ...
... on account of the ... and ...
... and the ...
... of one of the partners would be ...
... Many other cases might be cited. There can be but little
... over the fact that the ... and its contents
... and confidential information ...
... they were ... a court will not allow

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Catalog Co. v. Retailers' Factory Catalog Co., 206 Fed. 545; International News Service v. Associated Press, 248 U. S. 213.

We hold that the injunctive part of the order was proper and amply justified from the evidence before the court. This is not a case where complainant is seeking to restrain a mere libel which would be cognizable in a court of law. Vulcan Detinning Co. v. St. Clair, 315 Ill. 40. It is an injunction to stop the conduct of defendants which unfairly deprives complainant of that which belongs to it. The law will not allow ex-employees to make misrepresentations concerning their former employer's business for the purpose of acquiring this business for themselves or a new employer. National Life Ins. Co. v. Myers, 140 Ill. App. 392; Kenderdine v. Rouland, 260 Ill. App. 194.

Certain ledger sheets were first offered in evidence by complainant, to which counsel for defendants objected. They were admitted subject to defendants' right to strike them after all the evidence was in. During the cross-examination of one of complainant's witnesses defendants' counsel referred to these ledger sheets and examined the witness minutely as to their contents. Defendants did not move to strike these sheets until the hearing before the chancellor. This was properly denied. The cross-examination as to what the documents showed rendered the whole document admissible in evidence. Hamlin's Wizard Oil Co. v. U. S. Express Co., 184 Ill. App. 493; Boudinot v. Winter, 190 Ill. 394. Where a calculation is based upon the examination of numerous documents, books and papers which cannot conveniently be examined in court, the general result of the examination of the whole collection may be given by any competent person who has examined them, providing the result is capable of being ascertained by calculation. The People v. Gerold, 265 Ill. 448.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-11-2010 BY 60322 UCBAW/SJS

On 7. 11. 40. this man was interviewed by the
 Agent when he was seen in a court of law. Witness statement
 This is not a case where complaint is needed to maintain a case
 against and only justified from the evidence before the court.

1. The purpose of the proposed legislation is to provide for the establishment of a new and improved system of public health and safety. The purpose of the proposed legislation is to provide for the establishment of a new and improved system of public health and safety.

908 III. 443.

Respective counsel have gone minutely into the account stated by the commissioner. The commissioner approximated the profits and losses of complainant's tube cleaner business from the fiscal year ending January 31, 1921, to and including the fiscal year ending January 31, 1930. He found that as a result of the conspiracy and the wrongful acts of defendants, complainant was unable to enjoy the net profits after 1927 which it had enjoyed in prior years; that for the three years ending January 31, 1927, these totalled \$16,492.98; that but for the wrongs and injuries by defendants complainant would have made a net profit of at least this amount for the next three years ending January 31, 1930. The commissioner also found that complainant for the same reason suffered losses for the three years ending January 31, 1930, aggregating \$11,024.02. The sum of these two amounts, \$27,517, was the approximate damage. This account was fair and proper.

The weight of authority holds that the complainant is entitled in equity in an unfair competition case not only to injunctive relief but also to an accounting for both damages and profits. O. & W. Thum Co. v. Dickinson, 245 Fed. 609; Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251; Forster Mfg. Co. v. Cutter-Tower Co., 211 Mass. 219. In these cases it was said that the defendant should be held liable for the profits he may have gained on the theory that he has used the property of complainant in so doing, or on the theory that his conduct has been intentionally fraudulent and that defendant in consequence thereof is a trustee ex maleficio for the benefit of complainant.

The commissioner also reported that complainant will sustain losses to its good will and reputation by reason of the acts of defendants and damages and loss of business and profits for some time in the future. The decree which was entered January 24, 1931, ordered a further accounting to be made by the commissioner

of the damages sustained by complainant, to be determined by aggregating the sums paid the defendants for tube cleaners, etc., since June 1, 1927, by any person or customer who was a tube cleaner customer or agent of complainant prior to June 1, 1927. Defendants urge that, if complainant by the accounting already made recovers loss of profits and then, in addition, is permitted to recover whatever sums were paid to defendants for tube cleaners sold to former agents or customers of complainant since June 1, 1927, this would result in allowing complainant double compensation.

We do not so construe the decree. An accounting is an accounting and must take into consideration all the facts, including any accounts already stated or allowances made. Complainant is entitled so far as possible to full compensation, but it may not recover a double compensation for the same sale. So in stating a just account the commissioner should, of course, not charge against defendants the profits and losses already included in the account stated in the decree. The account should not include losses of the same profits which have already been awarded as damages. This is in accordance with Forster Mfg. Co. v. Cutter-Tower Co., 215 Mass. 136.

Many other points are made, but we do not deem them of controlling importance. Upon the entire record we hold that the decree should be affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

35149

M. WELCH,
Appellee,

vs.

MAX GELTNER et al.,
Defendants.

—
BERNARD SHULMAN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

264 I.A. 617³

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought her action in assumpsit against Max Geltner, the maker of a promissory note for \$3500, Jacob Shirman, the payee and endorser thereof, and Bernard Shulman, another endorser, and upon trial before the court without a jury, on plaintiff's motion, the suit was dismissed as to Geltner and Shirman and judgment was entered against Shulman alone to the amount of \$10,352, from which he appeals. Plaintiff does not appear in this court to defend the judgment.

It was shown that Mabel Welch, the plaintiff, was not the owner of the note and had no interest in it.

The law will presume ownership from the fact that one is in possession of a note. This presumption may be overcome by proof. The Evangelical Lutheran St. S. Cong. vs. Bishop, 213 Ill. App. 137; Farwell vs. Meyer, 35 Ill. 40. There is no evidence that the note was ever delivered to plaintiff, and she disclaims ownership and interest in it.

Plaintiff having disclaimed any beneficial interest in the note and her proof showing that Jacob Shirman and Anna, his wife, were the real owners, all defenses available against them were equally available as against plaintiff. Peulner v. Gillam, 211 Ill. App. 348.

Defendant Shulman's evidence showed that he was not indebted in any amount to Shirman and his wife; that the note was endorsed by him at the request of Geltner and Shirman. Shulman is an attorney and had represented Shirman in several real estate transactions. Geltner and Shirman came to Shulman's office about May 1, 1926. Geltner said that he and Shirman were jointly interested in a Florida real estate enterprise and Shirman needed some money and that he had asked Geltner to give him a note so that he could go to the bank and borrow. They asked Shulman to endorse the note and offered to leave some collateral with him. At first, he declined but finally did so on account of their past business associations. Shulman received no consideration for the note.

On behalf of plaintiff it was sought to show that Shulman was keeping some moneys coming to Shirman arising out of a so-called Nodes deal, but Shulman proved conclusively by producing checks, statements, books of account and letters, and by the testimony of his secretary and bookkeeper, that all the money Shulman held on the Nodes deal to which Shirman was entitled had been paid to Shirman sometime before the instant transaction.

Upon the record before us we conclude that the evidence did not justify the finding of the court, and the judgment is therefore reversed with a finding of facts, and as plaintiff is not entitled to recover judgment will be entered for defendant in this court.

REVERSED WITH A FINDING OF FACTS AND
JUDGMENT HERE FOR DEFENDANT.

O'Connor, P. J., and Hatchett, J., concur.

Defendant Shuman's evidence shows that he was not
indebted in any amount to Galtman and his wife; that the note was
endorsed by him at the request of Galtman and Shuman. Shuman is
an attorney and has represented Galtman in various ways since
1924. Galtman and Shuman came to Shuman's office about
May 1, 1934. Galtman said that he and Shuman were jointly in-
terested in a Florida real estate enterprise and Shuman needed
some money and that he had asked Galtman to give him a note so that
he could go to the bank and borrow. They asked Shuman to endorse
the note and offered to leave some collateral with him. At that
time he declined but finally did so on account of their past business
relationship. Shuman received no consideration for the note.
He is not at all liable if the money is not paid.
Shuman was keeping some money coming to Galtman arising out of
a so-called paper deal. But Shuman gives credence to the com-
ing checks, statements, books of account and letters, and by the
testimony of his secretary and bookkeeper, that all the money
Shuman held on the books due to which Shuman was entitled had
been paid to Shuman sometime before the instant transaction.
Upon the record before us we conclude that the evi-
dence did not justify the finding of the court, and the judgment is
therefore reversed with a finding of facts, and as plaintiff is
not entitled to recover judgment will be entered for defendant in

THIS CASE.

RECEIVED BY THE CLERK OF THE COURT
JANUARY 10, 1935

O'Connor, J., and others vs. ...

FINDING OF FACTS.

We find as facts that plaintiff did not own and had no interest in the note in question; that it was endorsed by defendant, Bernard Shulman, merely as an accommodation and that he received no consideration for the same; and that Shulman was not indebted at the time to Jacob Shirman and Anna Shirman, his wife, the owners of the note, by reason of any prior transactions.

The above information was obtained from the files of the FBI at New York City.

Sincerely,
Special Agent in Charge

35309

WILLIAM E. FISHER,
Defendant in Error,

vs.

EDWARD THOMAS SECOR,
Plaintiff in Error,
and LA GRANGE TRUST & SAVINGS BANK,

12
7
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 617⁴

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant Edward Thomas Secor seeks the reversal of a decree entered in a chancery proceeding by which complainant sought to establish a partnership and to secure an accounting. The cause was referred to a master in chancery who found accordingly and the decree confirmed the master's report and ordered a further reference to a master for the purpose of making an account. Defendant asserts in this court that the decree erroneously went beyond the report and attempted to state the account in definite amounts as due from defendant to complainant.

As the defendant concedes for the purpose of this review the correctness of the finding that complainant is entitled to an accounting, the only question is whether, as claimed, the decree erroneously attempted to state the account without any basis appearing in the record.

Complainant testified, and the master and decree found, that Fisher and Secor entered into an agreement in April, 1921, to buy and sell real estate; that the defendant Secor should furnish the money and receive 6% on the money he invested, title to all property to be taken in his name, and that there should be no division of the profits until the defendant received back the money invested by him with interest.

The first piece of property in question is No. 52 7th avenue, LaGrange, Illinois. The master found that this

1930

WILLIAM H. FISHER,
Defendant in Error.

vs.

JOHN W. FISHER,
Plaintiff in Error,
and JOHN W. FISHER & COMPANY, INC.,
Defendants.

264 I.A. 817

MR. JUSTICE ROBERTS delivered the opinion of the court.

By this writ of error defendant sought reversal of a decree entered in a summary proceeding by which complainant sought to establish a partnership and to set aside an accounting. The case was referred to a master in summary proceedings and the decree confirmed the master's report and ordered a further reference to a master for the purpose of making an account. Defendant asserts in this court that the decree erroneously went beyond the report and attempted to state the account in detail as the true account to complainant. As the defendant concedes for the purpose of this review the correctness of the finding that complainant is entitled to an accounting, the only question is whether, as claimed, the decree erroneously attempted to state the account without any basis appearing in the record.

Complainant testified, and the master and jury found, that Fisher and Jacob entered into an agreement in April, 1927, to buy and sell real estate; that the defendant began business with the money and received 50% on the money he invested. This to all property to be taken in his name, and that there should be no division of the profits until the defendant received back the money invested by him with interest.

The first piece of property in question is No. 52

7th Street, Lawrence, Illinois. The master found that this

property was purchased for \$8985.23 and sold for \$10,700, but also found that "the record herein does not show how much cash was paid nor the terms of sale nor the exact date thereof." However, the decree ordered the defendant "to account for the sum of \$1714.77, which is the excess of the price for which the property was sold over and above the purchase price." It appears that this, as well as all the properties, were sold on the installment plan and that only a part of the purchase price had been paid; that in this particular instance the purchaser had defaulted in his payments and the property had reverted to the seller and that the defendant had not received the money he had invested.

Very much the same situation obtains in the case of No. 94 Seventh avenue, LaGrange. The master found this was purchased for \$10,000 and sold for \$13,500, but also found that the record did not show how much cash was paid nor the terms of sale, yet the decree found that the defendant should account for the difference between these amounts, or \$3,500.

An unimproved five acre tract was bought for \$8,000, and an agreement entered into whereby the real estate firm of Barnett & Sutherland was to have the property subdivided and, when platted, to be conveyed to the LaGrange Trust & Savings Bank, trustee. The real estate firm undertook to sell the lots in the subdivision at certain prices named in the agreement. There was no showing in the record as to the results of the attempts of Barnett & Sutherland to sell this property nor whether any of it was sold, and the master so finds. It is also shown that after complainant had filed his bill he expressly ratified this arrangement by an agreed order releasing the property from the lien of his bill and authorizing the LaGrange Trust & Savings Bank to convey title to said premises to the purchasers thereof as provided in the trust agreement, and that the trustee should hold the balance

...the record herein does not show how much cash was paid
...the terms of sale nor the exact date thereof." However, the
...entered the defendant "to account for the sum of \$14,477.
...in the account of the balance for which the property was sold
...over and above the purchase price." It appears that this, as well
...all the properties, were sold on the installment plan and that
...only a part of the purchase price had been paid; that in this par-
...plaintiff furnished the purchaser had defaulted in his payments and the
...property had reverted to the seller and that the defendant had not
...received the money he had advanced.

Very much the same situation existed in the case of
...12. 24 Beverly Avenue, Cambridge. The master found this was purchased
...for \$10,000 and sold for \$12,500, but also found that the second
...did not show how much cash was paid nor the terms of sale, yet the
...between these amounts, or \$2,500.

...and an agreement entered into whereby the real estate firm of
...Barnett & Dufferin was to have the property subdivided and, when
...granted, to be conveyed to the defendant Trust & Savings Bank,
...trustee. The real estate firm undertook to sell the lots in the
...subdivision at certain prices named in the agreement. There was
...no showing in the record as to the results of the attempt to
...sell the lots and the defendant was not shown to have
...sold, and the master so finds. It is also shown that after
...had filed his bill he subsequently received this money
...by an agreed order releasing the property from the lien of
...his bill and authorizing the Cambridge Trust & Savings Bank to
...convey title to said premises to the purchaser thereof as provided
...in the first agreement, and that the master found that the

after proper deduction of commissions and expenses until the further order of the court.

The decree finds, however, that defendant sold the five acre tract to Barnett & Sutherland for \$35,400, the sum of the amounts which they undertook to obtain for the lots. In the decretal part of the decree the defendant is ordered "to account for such sum as shall be found to be due" as profits from the five acre tract, although later on in the same part of the decree it is ordered that the difference between the purchase price of this tract, namely, \$8,000, and \$35,400 be charged against the defendant. It is to be noted that the complainant filed no objections or exceptions to the report, and that without taking any other evidence it was in all respects confirmed by the decree.

We cannot conceive that it was intended by the master or by the chancellor to fix the amounts of the profits to be divided. If this were so, why should there be a second reference for the purpose of taking an account? Upon the taking of the account complainant is entitled to show what, if any, contribution he made to the partnership, and defendant is entitled to show the amount of money he invested and defendant is entitled to a return of the same with 6% interest before there is any division of profits. The terms of the sales and whether or not there is any profit to be divided should appear in evidence. It should be determined whether defendant is entitled to compensation for the use of his office and accessories in the partnership business. Flann v. Stone, 85 Ill. 164. On a bill for an accounting between partners there should be a complete adjustment of the partnership accounts and a disposition of all the partnership property, leaving nothing for subsequent settlement. Randolph v. Inman, 172 Ill. 575; Williams v. Henkle, 201 Ill. App. 362.

other proper disposition of same and not otherwise with the
 United States at the time.

The Justice of the Peace, however, did not believe that the
 five were tried to harvest a substantial sum of \$25,000, and that of
 the money which they undertook to obtain for the job. In the
 material part of the Justice the defendant is ordered "to account
 for every cent he shall be found to have received from the
 five were tried, and on in the same part of the de-
 fendant it is ordered that the defendant be ordered to account

price of this tract, namely, \$8,000, and \$15,000 be charged against
 the defendant. It is to be noted that the complaint filed on
 objections or exceptions to the report, and that without taking any
 other evidence it was in all respects confirmed by the Justice.

The Justice concludes that it was intended by the master
 or by the Chancellor to fix the amount of the profits to be divi-
 ded. If this were so, why should there be a second reference for
 the purpose of taking the account? Upon the taking of the account
 complainant is entitled to show what, if any, contribution he made
 to the partnership, and defendant is entitled to show the amount of
 money he invested and defendant is entitled to a return of the same
 with 6% interest before there is any division of profits. The

Justice of the Peace is wrong. It should be explained that
 defendant is entitled to compensation for the use of his office and
 as a bill for an accounting between parties that would be a
 complete settlement of the partnership account and a dissolution

of all the partnership property, and the Justice is wrong.
Williams v. Jones, 144 Ill. 375; Williams v. Jones,
 101 Ill. App. 388.

Defendant asserts there were no profits, but complainant invokes a rule which has no application here, namely, that where a partner misappropriates property of the firm he may be compelled to account for its value at the time of its misappropriation. The decree has erroneously followed this rule. The sale of the properties was not a misappropriation, for the very purpose of the partnership was to sell real estate.

The decree will therefore be reversed and the cause remanded with directions to enter a decree confirming the master's report finding that a partnership existed and that complainant is entitled to an accounting. The second reference to the master for the purpose of stating an account was proper. This accounting should be made along the lines suggested herein.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Hatchett, J., concur.

35332

HIBBARD, SPENCER, BARTLETT
& COMPANY, a Corporation,
Appellant,

vs.

ANNA SVEHLA,
Appellee.

13 7
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 617⁵

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking to recover \$2224.44 for goods sold to M. J. Svehla upon a contract of guaranty entered into by the defendant. The defendant claimed she had withdrawn the guaranty as provided for in the instrument. Plaintiff denied this, the case went to the jury on this issue, and a verdict was returned for the defendant. Plaintiff appeals from the judgment that he take nothing.

M. J. Svehla and Edward J. Svehla were copartners trading as M. J. Svehla. A form of guaranty was mailed to the defendant by plaintiff and it was signed and returned September 10, 1928. Among other things it provided that the defendant guaranteed the account of the above mentioned firm for all goods sold upon credit "until written notice of the withdrawal of this guaranty, signed by the undersigned, is delivered to the vendor at its office in Chicago, Illinois." She argues that before the goods for which judgment is sought were sold to this firm she had withdrawn this guaranty, that this was done by letter addressed and mailed to plaintiff on February 22, 1929.

Defendant testified that about this latter date she determined she did not want to be responsible for anybody else's credit any more, that her son wrote a letter to this effect which she signed, but that she did not see him put it in the mail. The son, Michael Svehla, Jr., testified that he wrote this letter,

10000

CHAS. W. BROWN, JR.
ATTORNEY AT LAW
CHICAGO, ILL.

ALAN T. BROWN

CHICAGO, ILL.

ALAN T. BROWN
CHICAGO, ILL.

2641 A. 617

ALL OTHERS WHOSE NAMES ARE ON THE LIST

Plaintiff brought suit seeking to recover \$2500.00

for goods sold to E. J. Swain. The goods were a quantity of clothing which
were by the defendant. The defendant claimed that the goods were
wrongfully so provided for in the agreement. Plaintiff denied this,
the case went to the jury on this issue, and a verdict was returned
for the defendant. Plaintiff appeals from the judgment that he take
appeal.

E. J. Swain and Robert E. Swain were respondents

trading as E. J. Swain. A form of guaranty was mailed to the de-
fendant by plaintiff and it was signed and returned September 10,
1938. About three weeks it remained until the defendant furnished
the account of the above mentioned item for all goods sold and ordered
"until written notice of the withdrawal of this guaranty, signed by
the undersigned, is delivered to the vendor at the office in Chicago
Illinois." The answer filed before the goods for which judgment is
sought were sold to this firm and had withdrawn this guaranty. That
this was done by letter addressed and mailed to plaintiff on Febru-
ary 22, 1939.

Defendant testified that about this latter date one

determined one did not want to be responsible for anybody else's
credit any more, that he now wrote a letter to this effect which
he signed, but that one did not see him put it in the mail. The
son, Michael Swain, Jr., testified that he wrote this letter,

addressed it to plaintiff, and mailed it the day after it was signed. No copy of the letter was retained nor had it been registered. No answer to this was received by defendant. About August, 1930, the house attorney for plaintiff called up defendant by telephone, telling her that the account was overdue, that plaintiff had her written guaranty and that payment was requested. The defendant denied signing the guaranty, but said that her son took care of the business and that plaintiff must look to him as defendant did not have the money. On the same date a letter was sent by plaintiff to defendant confirming this telephone conversation and formal demand was made for the payment of this account. Again a letter was written to defendant on October 3rd requesting payment. No reply was made to these communications. Two witnesses, who had charge of all mail received by plaintiff, testified that no such letter purporting to withdraw defendant's guaranty was received by it.

The rule is that if a contract specifies how a communication shall be sent, the use of any other method throws the burden upon the sender to prove the receipt by the other party. In the present case the guaranty does not specify any particular form for delivery of the withdrawal. Plaintiff presents definitions of the word "delivery" and cites certain cases which it argues means physical delivery by the sender. We do not agree with this construction. When plaintiff sent the guaranty to defendant by mail without indicating how delivery of her withdrawal should be made, the withdrawal might be delivered by mail. The general rule is that a letter properly addressed, stamped and mailed in a letter box of the United States mail raises a presumption that it was received in due course.

We are not satisfied that the jury properly found that this presumption was not rebutted. The witnesses who handled the

addressed is to plaintiff, and mailed is the day after it was signed
no copy of the letter was retained nor had it been registered. In
answer to this was received by defendant. About August, 1930, the
house attorney for plaintiff called up defendant by telephone, tell-
ing her that the account was overdue, that plaintiff had not written
plaintiff and that payment was required. The defendant denied
signing the guaranty, but said that her son took care of the mail-
ing and that plaintiff must look to him as defendant did not have
the money. On the same date a letter was sent by plaintiff to de-
fendant confirming this telephone conversation and formal demand was
made for the payment of this amount. This letter was signed
by defendant on October 2nd requesting payment. No reply was made
to these communications. Two witnesses, who had charge of all mail
received by plaintiff, testified that no such letter purporting to
withdraw defendant's guaranty was received by it.
The rule is that in a contract specifies how a contract-
action shall be sent, the use of any other method throws the burden
upon the sender to prove the receipt by the other party. In the
present case the guaranty was sent by registered mail for
delivery of the withdrawal. Plaintiff presents evidence of the
mail "delivery" and also evidence which is argued means physi-
cal delivery by the sender. It is not open with this construction
when plaintiff sent the guaranty to defendant by mail without indi-
cating how delivery of her withdrawal should be made, the withdrawal
might be delivered by mail. The general rule is that a letter
properly addressed, stamped and mailed in a letter box or the
United States mail creates a presumption that it was received by
the addressee.

It was not testified that the letter purporting to withdraw the
this presumption was not rebutted. The evidence was sufficient to

mail for plaintiff testified that no such letter was received. When defendant first heard by telephone from plaintiff about the guaranty, she made no claim that her guaranty had been withdrawn. The testimony as to the mailing of the withdrawal is not convincing. To permit a guarantor under such circumstances to avoid liability by merely asserting that such a letter had been sent, without producing a copy of the same or any acknowledgment of its receipt, would provide an easy way to avoid liability.

Furthermore, we are not impressed with the ingenuousness of some of the witnesses for the defendant. Michael J. Svehla, the husband of defendant and whose account was guaranteed, being questioned as to whether his signature was affixed to certain instruments, denied his signatures and indicated a disposition to stick to this denial until the attorney for defendant made the statement that the signatures were made by this witness, who thereupon admitted they were his. In other respects the testimony of other witnesses impressed us as somewhat shifty.

While we hesitate to disturb the verdict of a jury upon a question of fact, yet where, as here, the verdict is against the manifest weight of the evidence, we must reverse the judgment and remand the cause, which is accordingly done.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

mail for plaintiff testified that no such letter was received.
When defendant first heard by telephone from plaintiff about the
testimony, she made no claim that the letter had been delivered.
The testimony as to the mailing of the withdrawal is not convincing
and it gives a picture of a person who is not honest.
Plaintiff by merely asserting that such a letter had been sent,
without producing a copy of the letter or any other evidence of its
receipt, would provide an easy way to avoid liability.

Furthermore, we are not impressed with the testimony
that at some of the witnesses of the defendant, Michael T.
Vogel, for reasons of defendant and which amount to the defendant,
being questioned as to whether his signature was affixed to the
said instrument, Vogel did not testify that he had signed it.
In view of this, it is not surprising that the defendant was the
testimony that the signature was made up of this witness, and
therefore admitted that it was not. The other witnesses are likewise
of their evidence is based on an assumed truth.

Also we observe in Vogel's testimony that he was
not a partner in the firm, but rather, he was a partner in
another firm, which was at the time, he was a partner in
the firm and which the firm, which is a partnership firm.
Furthermore, we observe that the firm is a partnership firm.

O'Connor, E. J., and Pritchett, J., concur.

35343

VOISOPHONE COMPANY,
Defendant in Error,
vs.
JOHN KRAFCISIN,
Plaintiff in Error.

14
7
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 618¹

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This writ of error involves a motion under Section 89 of the Practice Act whereby the defendant sought to have set aside a judgment against him in the sum of \$1,000. The plaintiff demurred to the petition, which demurrer was sustained and the motion denied. The defendant asks for a reversal.

The petition of defendant alleges that he had employed the law firm of Cowen & Cowen to represent him in the defense of this cause; that on December 29, 1930, a notice and affidavit to place it on the trial calendar was served on his attorneys and a copy of the notice was left with his attorneys; that after the service of the notice the date of its receipt was changed from December 29, 1930, to January 3, 1931, and that this change was made without the knowledge or consent of his attorneys.

Petitioner further alleged that he was informed that on January 6, 1931, Joseph C. Cowen, one of the attorneys for petitioner, examined the register in the office of the Clerk of the Superior court, and that on that date it did not appear that any notice to place the case on the trial calendar had been filed; that subsequently, on May 18, 1931, an execution was served upon him; that he immediately made inquiry of his attorneys; that they examined the register kept by the Clerk of the Superior court and ascertained "that a notice purporting to be changed from showing the receipt of said notice on December 29, 1930, to January 3,

1931

WILLIAMSON COUNTY,
Tennessee ss. I, J. H. HARRIS,

clerk.

do hereby certify that
the within and foregoing is a true and correct copy of the original as the same appears from the records of the County of Williamson, Tennessee.

WILLIAMSON COUNTY,
Tennessee ss. I, J. H. HARRIS,

1931

NOT A TRUE COPY OF THE ORIGINAL AS THE SAME APPEARS FROM THE RECORDS OF THE COUNTY OF WILLIAMSON, TENNESSEE.

This is to certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the County of Williamson, Tennessee.

As at the trial and thereby the defendant sought to have set aside a judgment against him in the sum of \$1,000. The plaintiff demurred to the petition, which demurrer was sustained and the motion denied. The defendant asks for a reversal.

The petition of defendant alleges that he had assigned the law firm of Cowen & Cowen to represent him in the defense of this cause; that on December 29, 1930, a notice and affidavit to place it on the trial calendar was served on his attorney and a copy of the notice was left with the clerk; that after the service of the notice the date of the receipt was changed from December 29, 1930, to January 5, 1931, and that this change was made without the knowledge or consent of his attorney.

Petitioner further alleges that he was informed that on January 6, 1931, Joseph S. Cowen, one of the attorneys for petitioner, examined the register in the office of the clerk of the superior court, and that on that date it did not appear that any notice to place the case on the trial calendar had been filed; that subsequently, on May 18, 1931, an execution was served upon him; that he immediately made inquiry of his attorney; that they examined the register kept by the clerk of the superior court and ascertained "that a notice purporting to be changed from showing the receipt of said notice on December 29, 1930, to January 5,

1931, had been filed on January 7, 1931;" that this was the first knowledge petitioner had of the filing of this notice and that the records show that an "ex parte judgment" for \$1,000 had been rendered against him on April 1, 1931, and that "the first knowledge that he or his attorneys had of the entry of said judgment was after the service of said execution upon him."

The petition was supported by an affidavit of Erwin E. Cowen to the effect that on December 29, 1930, a notice and affidavit to place said cause on the trial calendar was served upon Cowen & Cowen as attorneys for said defendant.

The affidavit of Joseph C. Cowen was to the effect that the notice was served on the defendant's attorneys on December 29, 1930; that on January 6, 1931, he examined the register kept in the office of the Clerk of the Superior court and that said notice and affidavit had not been filed; that thereafter he had not again examined the files until after an execution had been served upon defendant, and that thereupon he examined the register and ascertained that a notice purporting to be changed from reciting the date of service as December 29, 1930, to January 3, 1931, had been filed and registered on January 7, 1931.

It is argued that failure to file the notice within five days after December 29th was a violation of the rules of court, and that changing the date of service on the original notice to January 3, 1931, was an error of fact which would justify the trial court in setting aside the judgment.

Rule 21 of the Superior court provides, "notice to the opposite party must be in writing stating the motion, time and place of hearing, and designating the judge before whom the same is to be made;" Section 2 of Rule 23 is as follows: "At any time after a cause is at issue either party may serve upon the other a

1931, was then filed on January 7, 1931; that this was the first
known petition and of the filing of this notice and that
the records show that an "EX PARTE Judgment" for \$1,000 had been
rendered against him on April 1, 1931, and that "the latter knowl-
edge that he or his attorneys had of the entry of said judgment
was after the entry of said execution was filed."

The petition was supported by an affidavit of Edwin W.
Cowan to the effect that on December 22, 1930, a notice and affida-
vit in case said cause on the trial calendar was served upon
Cowan & Son as attorneys for said defendant.
The affidavit of Joseph E. Cowan was to the effect that
the notice was served on the defendant's attorneys on December 22,
1930; that on January 3, 1931, he examined the register kept in the
office of the clerk of the Superior Court and was said notice and
affidavit had not been filed; that thereafter he had not again
examined the files until after he ascertained that some notice had
been filed, and that thereafter he examined the register and ascer-
tained that a notice pertaining to the case had been filed on
the date of service on December 22, 1930, as January 3, 1931, and was
then and registered on January 7, 1931.

It is noted that failure to file the notice within
five days after December 22nd was a violation of the rules of
court, and that knowing the date of service on the original notice
to January 3, 1931, was an error of fact which would justify the
trial court in setting aside the judgment.
Rule 21 of the Superior Court provides, "notice to the
opposing party must be in writing signed by the party, filed and
placed of record, and designating the judge before whom the same
is to be made;" Section 3 of Rule 23 is as follows: "at any time
after a case is at issue either party may move upon the other a

notice to the effect that he desires the cause placed upon the trial calendar of the judge to whom it has been assigned. Such notice, with proof or acknowledgment of service, shall be filed with the minute clerk of the judge, or with the clerk of the court during the summer recess, within five days after its service. In other respects such notice shall be governed by the provision of Rule 21 so far as applicable." The form of the notice is provided in section 5 of rule 23, and is as follows: "You are hereby notified that (either party) desires the above mentioned cause to be placed upon the trial calendar and shall file this notice for the purpose pursuant to the rules of court." Rule 3 provides that the clerk shall keep a law and chancery register in which, among other things, should be noted "the date and time of day of filing each paper filed in such cause, describing the same as briefly as may be necessary for identification." The argument is that the plaintiff did not file the notice to place the cause on trial within five days after the service on December 29, 1930.

The petition is defective and insufficient in many respects. It does not allege that no other notice to place the cause on the trial calendar was served upon defendant's attorneys; it does not allege that defendant did not know the case had been placed thereon; neither does it allege that defendant or his attorneys did not know that the case had been placed upon the trial calendar, nor that they had no knowledge of the time it was called for trial; neither does it definitely allege that they were not present when the case was called. It only asserts that they did not know of the entry of judgment until some time afterwards. The petition does not assert that the plaintiff did not file the notice with the minute clerk of the Judge to whom the case had been assigned, within five days after service.

Notice to the effect that he desires the cause placed upon the trial calendar of the Judge to whom it has been assigned. Such notice, with proof or acknowledgment of service, shall be filed with the minute clerk of the Judge, or with the clerk of the court, within the number of days after the date of the filing of the petition as shall be governed by the provision of Rule 11 of the Rules of the Court. The form of the notice is prescribed in section 5 of Rule 33, and is as follows: "You are hereby notified that (either party) desires the above mentioned cause to be placed upon the trial calendar and shall file this notice for the purpose pursuant to the rules of court." Rule 3 provides that the court shall keep a list and summary register in which, among other things, shall be noted "the date and time of filing each paper filed in such cause, describing the same as briefly as may be necessary for identification." The argument is that the plaintiff did not file the notice to place the cause on trial within five days after the service on December 27, 1930.

The petition is defective and insufficient in many respects. It does not allege that no other notice to place the cause on the trial calendar was served upon defendant's attorneys. It does not allege that defendant did not know the case had been placed thereon; neither does it allege that defendant or his attorneys did not know that the case had been placed upon the trial calendar, nor that they had no knowledge at the time it was called for trial; neither does it definitely allege that they were not present when the case was called. It only asserts that they did not know of the entry of judgment until some time afterwards. The petition does not assert that the plaintiff did not file the notice with the minute clerk of the Judge to whom the case had been assigned, within the number of days after service.

The petitioner in substance shows only that on a certain date his attorneys examined the register and failed to find a notice which had been served on them more than five days previously. For aught that appears to the contrary, the defendant's attorneys might have known when and where the case was called for trial. The petition was insufficient to sustain the motion to vacate the judgment and the demurrer was properly sustained and the motion denied. The judgment will therefore be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

35402

FRANK E. SCHORNFELD,
Appellee,

vs.

BOSTON STORE,
Appellant.

157
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 618²

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

This controversy arises over the sale of a radio set by defendant to plaintiff. Plaintiff claims to have rescinded the sale and brought suit to recover \$80 which he had paid on account. Defendant filed a plea of set-off, asking for recovery of \$337.15 as the balance of the purchase price. Upon the trial by the court without a jury the finding was against the defendant's set-off and for the plaintiff, and judgment for \$80 was entered against the defendant, from which it appeals.

Plaintiff claimed a breach of warranty by the seller in that the radio was not fit for the particular purpose for which it was bought. Defendant argues that the radio was sold under a trade name, making applicable paragraph 4 of section 15 of the Uniform Sales act, which provides that in the case of a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

The trial court could properly find that plaintiff had seen an advertisement by defendant of the Brunswick Panatropes radio and in December, 1925, called at defendant's store and had a conversation with its salesman regarding a purchase. The salesman first asked plaintiff what model he was interested in and he replied that he did not know but would like to see the different models; that his old radio set was unsatisfactory

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IN SENATE
JANUARY 1, 1907

REPORT
OF THE

264 I.A. 618

THE JOURNAL OF THE SENATE

This controversy arises over the sale of a radio set
by defendant to plaintiff. Plaintiff claims to have purchased the
radio and brought suit to recover \$30 which he had paid on account.
Defendant filed a plea of set-off, asking for recovery of \$217.15
as the balance of the purchase price. Upon the trial by the court
without a jury the finding was against the defendant's set-off and
for the plaintiff, and judgment for \$30 was entered against the de-
fendant, from which it appeals.

Plaintiff claimed a breach of warranty by the seller
in that the radio was not fit for the particular purpose for which
it was bought. Defendant argues that the radio was sold under a
trade name, making applicable paragraph 4 of section 12 of the
Uniform Sales act, which provides that in the case of a sale of
a specified article under its patent or other trade name, there
is no implied warranty as to its fitness for any particular pur-
pose.

The trial court could properly find that plaintiff
had been an advertisement by defendant of the Brunswick Radiograph
radio and in December, 1906, called at defendant's store and had
a conversation with its salesman regarding a purchase. The
salesman then asked plaintiff what model he was interested in
and he replied that he did not know but would like to see the
different models and the radio was accordingly shown.

because it could not get out of town stations; that a neighbor of his could get Los Angeles and New York and he wanted a set that "would be like that;" that the only reason he wanted to get a new set was that he wished to get these stations. The salesman said that the Brunswick Panatrope would do everything that plaintiff wanted and "a whole lot more," and plaintiff said he would purchase it but that if it did not get these ^{out} of town stations it would be sent back. The radio was delivered to plaintiff's residence. There is ample evidence that the radio failed to meet the representations made. Witnesses testified that there was a terrible undertone or hum. Many complaints were made to defendant. Men were sent by defendant to place it in order but apparently without success. Finally, in the following June, 1930, a representative from defendant's cause, examined the radio and then telephoned to defendant's office, saying that "the radio is absolutely worthless, no volume, no selectivity." This representative told plaintiff that defendant would send out a new radio.

June 6th or 7th, 1930, the first instrument was removed by defendant and a second one was put into plaintiff's home. Both Mr. and Mrs. Schoenfield testified that the second radio was installed against their protest; that plaintiff told the men who brought it that he would not accept it - that "I didn't want it, they could keep it." The men said they couldn't do anything about it, they would have to leave it there. Plaintiff told defendant that it was defendant's radio and that "they could come and get it." The new instrument proved as unsatisfactory as the first and plaintiff offered to return it and upon the trial was still willing to return it.

From the circumstances surrounding the sale it is evident that the radio was not sold "under its patent or other trade name." No witness testified that this particular type of

because it would not get out of town stations; that a number of
his could get low signals and New York and he would a set that
"would be like that;" that the only reason he wanted to get a new
set was that he wished to get these stations. The defendant said
that the Brunswick Telephone would be everything that plaintiff
wanted and "a whole lot more," and plaintiff said he would purchase
it but that it is ^{not} the only town station it would be
sent back. The radio was returned to plaintiff's house.
There is ample evidence that the radio failed to meet the require-
ments made. Plaintiff testified that there was a terrible
distortion of tone. Many complaints were made to defendant. The
radio was sent by defendant to place it in order but apparently with-
out success. Finally, in the following June, 1936, a representative
came from defendant's home, examined the radio and then telephoned
to defendant's office, saying that "the radio is absolutely useless."
This representative told plain-
tiff that defendant would send out a new radio.
On June 28th or 29th, 1936, the first installment was re-
moved by defendant and a second one was put into plaintiff's house.
Both Mr. and Mrs. Schoenfeld testified that the second radio was
installed against their protest; that plaintiff told the man who
brought it that he would not accept it - that "I didn't want it,"
they could keep it." The man said they couldn't do anything about
it, they would have to leave it there. Plaintiff said defendant
told it was defendant's radio and that "they could come and get it."
The new instrument proved an unsatisfactory one like the first and plain-
tiff offered to return it and upon the trial was still willing to
return it.
From the circumstances surrounding the sale it is
evident that the radio was not sold "under its patent or other
trade name." It appears further that this defendant was not

radio had any patent or trade name, but even if it had, the evidence shows that the buyer was not relying upon this but upon the representations of the seller that with the instrument plaintiff would be able to hear far-away stations, such as New York and Los Angeles. The buyer was not exercising his own judgment in the matter. It is a case where the seller undertakes to select and supply the kind of instrument which would meet the buyer's requirements.

The seller who effects a sale by making certain representations as to an article, which the buyer relies on, cannot avoid responsibility for a breach of such representations by saying that the article had a trade name. Cases cited by defendant are not in conflict with this rule. In Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88, the conclusion was predicated upon the fact that the buyer got what he bargained for, in which case there was no implied warranty. In Santa Rosa-Vallejo Tanning Co. v. Kronauer & Co., 228 Ill. App. 236, cited by defendant, the evidence showed that the trade name had been used to designate a particular brand of leather for upwards of twenty-nine years and had been a standard product under this name; that the defendant, who had ordered under this trade name, had been familiar with this name for some ten or twelve years. Under such circumstances, the court held, the order was under a trade name. That is not the case here.

Applicable to the instant circumstances is the case of Ireland v. Liggett Co., 243 Mass. 243, where an article was sold under a trade name and the buyer attempted to rescind. The court said that the statutory provision (like our clause 4, sec. 15 of the Sales act) "applies where the transaction results from the desire of one to purchase and the obligation of another to deliver a definite article having a 'patent or other trade name.'"

A seller who recommends a specific thing as fit for the buyer's use does not bring himself within the help of this exception, where it can be found that his advice and judgment were relied upon and that the article was not delivered in fulfillment of the buyer's offer to purchase goods identified by a name known to the trade." In Foley v. Liggitt & Myers Tobacco Co., 241 N.Y.S. 233, it was said: "The mere fact that an article sold happens to have a trade name does not per se bring the sale under Subdivision 4 of Section 96 of the Personal Property Law. *** Sellers *** cannot escape liability by attaching a trade name or patent name to their article." To the same effect are Sachter v. Gulf Refining Co., 203 N.Y.S. 769; Kolberg v. Central Fruit & Grocery Co., 27 Ohio App. 64; Windom v. Morris Hardware Co., 151 Wash. 86; Brought v. Redewill Music Co., 17 Ariz. 393.

Defendant next urges that when plaintiff continued to use the radio after he had given notice of rescission of the purchase, he waived his right to rescind. The second instrument was delivered, as we have said, on June 6, 1930. This suit was commenced August 6, 1930. The trial court refused to find that plaintiff, from the time the second radio was delivered until February, 1931, played the radio on an average of three times a week. We hold this finding was proper. Mrs. Schoenfield testified that the radio was never^{so} used but simply tried to see if it would work; that after trying it a few times for about five minutes it made so much noise she had to shut it off. She testified at the time of the trial that they had not played it for two months or more. Since the radio was bought for the purpose, among other things of enabling the buyer to reach far away stations, he would be expected to try out the instrument; we do not see how otherwise the buyer would be able to determine that the instrument was of the kind it

was represented to be. In Conner v. Dorland-Grannis Co., 294 Ill. 58, it was held that the acceptance and use of an automobile does not constitute a waiver of the purchaser's right to rescind the contract, return the property, and sue to recover payments made, where the alleged defects in the car are such as can be discovered only by its use, and that the question whether the retention of the car has been for more than a reasonable time is ordinarily a question of fact.

The defendant, however, strenuously contends that even the slightest use of the radio after plaintiff had commenced suit constitutes an appropriation of the property to his own use. We cannot agree with this. The attitude of the plaintiff was that he did not want the radio. A witness for defendant testified that when in July he examined the second radio and informed plaintiff that a tube had gone bad, plaintiff told him that he did not want the set touched, "that he was through with all contracts with the Boston store." This clearly indicated that plaintiff did not intend to retain the instrument, and the occasional attempts to use it did not negative this position.

We hold that the judgment was right and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

35443

MAMIE CLARK,
Appellant,

vs.

CITY OF CHICAGO, a
Municipal Corporation,
Appellee.

16
7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 618³

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

This is an action of trespass on the case wherein plaintiff sought to recover damages for injuries sustained by her when she stepped upon the cover of a coal hole in a sidewalk on Twenty-sixth place in Chicago which turned, causing her to fall into the hole and receive the injuries alleged.

The trial court at the close of plaintiff's case instructed the jury to find for the defendant on the ground that there was no evidence that the defendant had notice of the alleged defective condition of the coal hole and cover or that this condition had existed for such a time prior to the accident that it should have known of the alleged defect.

It is well settled that a municipality is not liable for injury from a defective sidewalk unless it has notice of the defect or it has existed for such a length of time that the city should have known of the conditions in the exercise of reasonable diligence. In the absence of such showing it becomes a question for the court to determine whether ^{there} is liability. Boender v. City of Harvey, 251 Ill. 226; City of Chicago v. Stearns, 105 Ill. 554; City of Chicago v. Murphy, 84 Ill. 224; Curtis v. City of Paris, 234 Ill. App. 163.

There is no evidence of any defect in the sidewalk or coal hole or cover. The evidence tends to show that as plaintiff was walking along the sidewalk at about noon of a bright, clear

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There are no known persons in the area.

When she stepped upon the cover of a coal hole in a basement in Twenty-third place in Chicago which she had, caused her to fall into the hole and receive the injuries alleged.

—by using a 100% liability for the 2001 and 2002 tax years.

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for the most in technical matters. In addition, it is well noted that a municipality is not liable for injury from a defective sidewalk unless it has notice of the defect or it has noticed for such a length of time that the city should have known of the condition in the exercise of reasonable diligence. In the absence of such showing it becomes a question there

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day, she stepped on a coal hole cover, which turned and plaintiff fell into the hole up to her waist. Witnesses testified that this coal hole was used frequently in delivering coal to the adjacent premises. One witness testified that the hole was open several times a week to permit the delivery of coal and that sometimes "the engineer would put the cover back." It is evident that either the truck man delivering the coal or the engineer of the adjacent building did not put the cover on securely just prior to the accident.

As the trial court remarked, the opening of the coal hole was merely a temporary affair and the mere fact that the cover had not been put back on securely would not impose any obligation on the defendant. In the absence of any evidence showing actual notice that the cover had not been properly replaced, and in the absence of any evidence as to how long prior to the accident this condition existed, plaintiff failed to prove a necessary element in her case.

Although the point is not made in plaintiff's brief, there is a slight suggestion in argument that the court did not permit a witness, Cook, to testify as to how long this condition existed prior to the accident. The record does not justify this criticism. The witness had described the cover, when the accident happened, as "slightly off." The next question was, "How was this cover off? Did you ever notice it like that on any other occasion?" This question was double in form and objection was properly sustained. Plaintiff made no offer to prove how long prior to the accident the cover was improperly placed. However, in view of Cook's testimony that this hole was open several times a week for delivery of coal, it was evident that the improper replacement of the cover had not existed for such a length of time that the defendant should

...the witness on a small table near the engine and the
tall into the hole up to her waist. Witness testified that this
hole was used frequently in delivering coal to the engine
...the witness testified that the hole was used
...a week to pay for the delivery of coal and that sometimes
"the engineer would put the cover back." It is evident that
either the fireman delivering the coal or the engineer of the
adjacent building did not put the cover on securely each time to
the accident.

At the trial court remarked, the opening of the coal
hole was merely a temporary affair and the mere fact that the
cover had not been put back on securely would not impose any ob-
ligation on the defendant. In the absence of any evidence showing
actual notice that the cover had not been properly replaced, the
in the absence of any evidence as to how long prior to the acci-
dent this condition existed, liability failed to prove a necessary
element in her case.

Although the point is not made in liability's brief,
there is a slight suggestion in argument that the court did not
permit a witness, Cook, to testify as to how long this condition
existed prior to the accident. The record does not justify this
objection. The witness had described the cover, when the accident
happened, as "slightly off." The next question was, "how was this
ever off? Did you ever notice it like that on any other occasion?"
This question was double in form and objection was properly sustained.
Liability made no other use of this brief in the accident and
cover was properly closed. However, in view of Cook's testi-
mony that this hole was open several times a week for delivery
of coal, it was evident that the improper replacement of the cover
had not existed for such a length of time that the defendant should

have known it. A municipality cannot be expected to follow closely persons who properly use such holes in the sidewalk to see that they replace the covers carefully.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

35452

J. V. DE LANEY,
Appellee,

vs.

WABASH RAILWAY COMPANY,
Appellant.

177
APPEAL FROM SUPERIOR COURT OF
COOK COUNTY.

264 I.A. 618^f

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it for \$2418 in an action to recover for loss or damages to shipments of fruits and vegetables delivered to defendant for transportation and delivery to various points. The claim was made up of a number of items which were united in one suit, the declaration consisting of twenty two counts. The last count set forth an assignment to plaintiff of the claims with an affidavit that plaintiff was the actual bona fide owner of said causes of action. Defendant demurred to the declaration, which, after argument, was overruled. Defendant stood by this demurrer and judgment was rendered for the plaintiff. Subsequently, upon defendant's attorney stating to the court that he felt defendant had a good defense upon the merits, the court vacated the judgment and gave defendant leave to plead.

Subsequently defendant filed a demurrer in much the same form as before, and also filed a so-called answer to the common counts. This being an action at common law, defendant should have filed a plea. The answer is simply a denial in general terms that defendant is indebted to plaintiff. The affidavit attached to the answer is to the effect that John Gibson Hale is the agent and attorney of the defendant and authorized to make this affidavit and has knowledge of the things set forth in the answer and that the matters and things contained therein are true. Section

A. V. DE LAUNY,
Attorney,
JAMES EARL RAY,
Defendant.

264 I.A. 618

U.S. DISTRICT COURT, DISTRICT OF COLUMBIA

This is an appeal by defendant from a judgment entered
in favor of plaintiff in an action for loss or damage to this
case of fruits and vegetables collected to defendant for trans-
portation and delivery to various points. The claim was made up
of a number of items which were united in one bill, the defendant
claiming a total of twenty-two items. The last count set forth
an assignment to plaintiff of the claims with an affidavit that
plaintiff was the actual owner of said count of action.
Defendant admitted to the defendant, which, after payment, was
overruled. Defendant moved by this defendant and plaintiff was
found for the plaintiff. Wherefore, with defendant's attorney
stating in the court that he had admitted and a great defense
upon the matter, the court rendered the judgment for the plaintiff
leave to stand.

Wherefore defendant filed a demurrer to such the
case from the plaintiff, and also filed a no-answer answer to the
second count. This being an action of common law, defendant
pleaded that he was a slave. The answer is hereby a denial in two
that there was delivery to plaintiff of plaintiff. The affidavit
attached to the answer is to the effect that John Brown was
the agent and attorney of the defendant and authorized to take this
affidavit and was provided by the judge for the answer
and that the matter was being conducted through the firm.

55 of the Practice act requires a defendant to file with his plea an affidavit stating that he believes he has a good defense to the suit "and specifying the nature of such defense."

Subsequently, on motion of plaintiff, the court held that the answer and affidavit of merits were insufficient and they were stricken and the demurrer was overruled. Defendant elected to stand by its demurrer and judgment was entered for plaintiff. Later defendant made a motion to set aside the judgment and to carry back the demurrer to the declaration. This was overruled. Defendant subsequently filed a plea of general issue and set-off but filed virtually the same affidavit of defense as before without specifying the nature of the defense. Motion was made by the plaintiff to strike the affidavit of defense, which was done. No motion was made by defendant to file an amended plea and judgment was again entered for plaintiff. The above narrative discloses the trial court was liberal in his rulings. Two judgments were vacated and set aside upon the representation of defendant's attorney that he thought he might be able to set forth a good defense. The latter so-called pleas filed on behalf of defendant were virtually repetitions of prior pleas.

Defendant, by filing the plea of general issue, waived demurrer and could not have it carried back to the declaration. People v. Life Insurance Co., 267 Ill. 504; Nordhaus v. Railway, 242 Ill. 166; Wolf v. Powers, 241 Ill. 9.

Defendant argues that the assignment of the claims to plaintiff is improper, but it has been held that if the assignment has not been denied under oath the authority of plaintiff to sue cannot be denied. There was no denial under oath. Warman v. Bank, 185 Ill. 60; Dorn v. Tyler, 64 Ill. App. 110.

The plea or answer filed by defendant did not specify

of the practice and procedure of the defendant to file with his plea
an affidavit stating that he believes he has a good defense to
the suit and specifying the nature of such defense.

Defendant, by filing the affidavit, has waived his right
that the answer and affidavit of notice were inadmissible and they
were received and the answer was overruled. Defendant elected to
stand by his answer and judgment was rendered for plaintiff.

Later defendant made a motion to set aside the judgment and to
entry back the answer to the declaration. This was overruled.

Defendant subsequently filed a plea of general issue and set-
off but filed virtually the same affidavit of defense as before
and the court, in its judgment, set aside the judgment and
by the plaintiff to prove the affidavit of defense, which was
made. No motion was made by defendant to file an amended plea
and judgment was again entered for plaintiff. The above narrative
shows the final court was entered in his ruling. The judge
was not satisfied and set aside when the representation of the
defendant's attorney that he thought he might be able to set aside
a good defense. The latter so-called plea filed on behalf of
defendant were virtually repetitions of prior pleas.

Defendant, by filing the plea of general issue, waived
answer and could not have it carried back to the declaration.

People v. John J. Connelley, 107 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

the nature of its defenses as required by section 55 of the Practice act, hence there was no error on the part of the court in striking same. Sauer v. Cohen, 208 Ill. App. 432; Harris v. Willis, 209 Ill. App. 401.

Defendant argues that it was entitled to a set-off for freight charges. We do not conceive that this point is properly before us. However, under the Interstate Commerce act a carrier cannot set off freight charges against loss and damage, (L. & N. v. Mottley, 219 U. S. 467) although in C. & N. W. v. Lindell, 50 Sup. Ct. Rep., 200, it is held that such losses may be set off by freight charges where allowed by the statute of the state. The reason for disallowing the set-off is that it would open the door to all kinds of fraud and rebating.

As to the defendant's argument based upon the bill of lading, it is sufficient to say that plaintiff has not pleaded any other than an oral contract, and that if any defense might have been presented under a bill of lading such defense should be pleaded and verified by affidavit. This was not done. We see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

The nature of the defenses as required by section 36 of the 1940-
41 act, passed March 22, 1941, is the fact of the law in
this case. Smith v. Smith, 100 F.2d 841, 100 A.2d 841, 100
V.I. 101, 102, 103.

Defendant argues that it was entitled to a refund
for its 1941 payment. It is not necessary that the refund be
properly before the court, since the defendant's payment was
a refund of money not lawfully received by the government.
(1) Smith v. Smith, 100 F.2d 841, 100 A.2d 841, 100
V.I. 101, 102, 103, is a case which was decided by
the court in 1941. The court in that case held that the
refund was not lawfully received by the government in 1941.
The court in that case held that the refund was not lawfully
received by the government in 1941.

It is the defendant's argument that the refund was
lawful, it is entitled to say that initially it was not placed in
other than an oral contract, and that if any defense might have
been presented under a bill of lading even defense should be
placed and verified by affidavit. This was not done. We see no
reason in this case to uphold the judgment, and it is affirmed.

Affirmed.

6/10/41, 3:30, was received, 6/10/41.

35546

LOUIS TURK,
Appellant,

vs.

CITY OF CHICAGO,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 619¹

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment entered after trial by the court without a jury in an action in assumpsit wherein plaintiff sought to recover interest on a judgment entered in a special assessment proceeding wherein certain property belonging to plaintiff was taken or damaged for public use.

There is no dispute as to the important facts. January 1, 1925, the defendant filed its petition under section 32 of the Local Improvement act, chapter 24, Ill. Statute, to condemn certain premises, including lots owned by plaintiff, for the purpose of widening Western avenue in Chicago. A final and unconditional judgment was entered in these proceedings against defendant on December 31, 1928, for \$22,500. No appeal was taken or writ of error sued out to review this. The plaintiff remained in possession of the premises and received some income therefrom until September 22, 1930, on which date the amount of the judgment, without interest, was paid to plaintiff, who surrendered possession of the property to the City. Plaintiff at the time demanded interest on the judgment, which was refused. He now claims interest at the rate of 5% per annum on the amount of the judgment from the date it was rendered until defendant took possession of the property. The trial court was of the opinion that plaintiff was not entitled to interest and so held.

In University of Chicago v. City of Chicago, 256 Ill. App. 189, this court had occasion to consider the question of

JOHN T. ...

BY ...

IN WITNESS WHEREOF ...

ATTEST ...

IN WITNESS WHEREOF ...

ATTEST ...

204 L.A. 619

AS JUSTICE HEREBY DELIVERED THE VERDICT OF THE COURT.

Plaintiff appeals from an adverse judgment entered

after trial by the court without a jury in an action in rem

wherein plaintiff sought to recover damages on a judgment entered

in a special proceeding brought by plaintiff against

defendant for plaintiff was taken or damaged for public use.

There is no dispute as to the facts of the case.

Plaintiff, the defendant filed the petition with notice to the

local improvement act, chapter 24, 111, 112, to condemn and

take property, including land owned by plaintiff, for the purpose

of widening Western Avenue in Chicago, a time and improvement

judgment was entered in these proceedings against defendant on

December 21, 1928, for \$25,000. An appeal was taken on writ of

error was set out to review this. The plaintiff remained in possession

of the property and received from defendant interest on the judgment

of \$2,100, on which rate the amount of the judgment, without in-

terest, was paid to plaintiff, who surrendered possession of the

property to the City. Plaintiff at the time demanded interest on

the judgment, which was refused. He now claims interest at the

rate of 10 per annum on the amount of the judgment from the date

it was rendered until defendant took possession of the property.

The trial court was of the opinion that plaintiff was not entitled

to interest on the judgment.

In University of Chicago v. City of Chicago, 204 Ill.

App. 100, this court had occasion to consider the question of

whether final and unconditional judgments for compensation for premises taken under the Local Improvement act draw interest from the time they are rendered until they are paid and possession taken by the City. A majority of this court held that such judgments draw interest, Mr. Justice O'Connor dissenting. The essential question in the case at bar is the same as was decided in the University of Chicago case, and the majority opinion in that case must control the present case. For the reasons stated in that opinion we hold that plaintiff was entitled to interest from the date the judgment was entered until it was paid and the City took possession of the property.

We realize that this is an important question and should be finally determined by our Supreme court. As indicated by the two opinions in the University of Chicago case, there is a decided difference as to whether or not the Supreme court, in ^{there} the many cases/cited, has passed upon this question, and this difference apparently cannot be harmonized until the Supreme court has definitely spoken.

Following the majority opinion in the University of Chicago case, we hold that the judgment for \$22,500 less \$2698, the amount of plaintiff's assessment, draws interest at the rate of 5% from December 31, 1928, to September 22, 1930. As the case was tried by the court, the judgment will be reversed and judgment for \$1759.00 in favor of plaintiff will be entered in this court.

REVERSED AND JUDGMENT FOR
PLAINTIFF ENTERED IN THIS COURT.

O'Connor, P. J., dissents.
Matchett, J., concurs.

...the time they were requested until they are paid and compensation taken by the City. A majority of this board said that such large sums were required, Mr. Justice's former statement. The same trial question in the case at law in the same as was decided in the University of Chicago case, and the majority opinion in that case must control the present case. For the reasons stated in that opinion we hold that plaintiff's motion to dismiss from the case the following was granted until it was said that the City had possession of the property.

It is further stated that it is an important question and should be finally resolved by the highest court. As indicated by the two opinions in the University of Chicago case, there is a distinct difference as to whether or not the University case, in the very recent past, has passed upon this question, and this difference apparently ought to be resolved with the highest court and finally settled.

Following the majority opinion in the University of Chicago case, we will now consider the University of Chicago case. The amount of plaintiff's assessment, shown in account as the case of 24700 December 31, 1933, to December 31, 1934. At the end of the year, the subject was between the plaintiff and the City of Chicago. The subject will be entered in said court.

RECORDED AND RETURNED TO
PLAINTIFF RETURNED TO CITY COURT.

6:00pm, N. Y. State
March 1, 1935.

35586

KENNETH LAFRENIERE, for use of,
SWARTS BROS., INC.,)
Appellee,)

vs.)

BINKLEY COAL COMPANY,)
Appellant.)

197
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 619²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Upon the trial of a fourth class case to recover the balance of the purchase price of a watch, the court, without a jury, entered judgment against the defendant in the sum of \$90, from which it appeals. Swarts Bros. & Co., Inc., hereafter called plaintiff, brought suit on an alleged assignment of wages due from the defendant to Kenneth Lafreniere. The plaintiff's theory was that between the assignee and the defendant, the employer of Kenneth, the defendant could not interpose any defenses which questioned the validity of the assignment. Defendant sought to show that Lafreniere at the time of the alleged assignment was a minor, that the assignment was part of the contract of purchase of the watch, that it had been disaffirmed by the minor and therefore the plaintiff had no cause of action.

In January, 1931, Lafreniere, employed by the defendant, was a minor. He entered into an installment sale agreement with Swarts Bros. for the purchase of a wrist watch, upon which he paid five dollars down and signed a judgment note, wage assignment and installment sale agreement for the balance. Notice of assignment was served on the defendant. Lafreniere lived at home with his parents and was earning \$30 a month. The defendant offered to show not only that Lafreniere was a minor at this time, but that he gave his earnings to his father; that he did not read the paper given him by plaintiff for his signature; that a few days

10 MAY 1961
AIR MAIL
NY
WASHINGTON DC
JULIUS ROSENBERG

[illegible]

When the trial of a fourth class case is removed to the balance of the purchase price of a watch, the court, without a jury, entered judgment against the defendant in the sum of \$500, from which it appears. George Brown & Co., Inc., hereafter called Plaintiff, brought suit on an alleged assignment of wages and from the defendant to Kenneth Patterson. The Plaintiff's theory was that between the assignor and the defendant, the employer of Kenneth, the defendant could not interfere with the wages which questioned the validity of the assignment. Plaintiff and sought to show that Patterson at the time of the alleged assignment was a minor, that the assignment was part of the contract of purchase of the watch, and that it had been disaffirmed by the minor and therefore the Plaintiff had no cause of action. In January, 1931, Patterson, employed by the defendant, was a minor. He received into his possession the watch and the money for the purchase of a watch which, when sold, said the balance due and signed assignment note, were assigned and later the assignment was assigned to the balance. Notice of assignment was served on the defendant. Patterson lived at home with his parents and was earning \$30 a week. The defendant offered to show not only that Patterson was a minor at this time, but that he gave his earnings to his father; that he did not read the paper given him by Plaintiff for his signature; that a few days

afterwards he went back to plaintiff's store and told the salesman who sold him the watch that he did not want it and could not pay for it; that the salesman directed him to the credit manager to whom he repeated that he did not want the watch and could not pay for it; that plaintiff could keep the \$5 which had been paid down and he tendered back the watch by placing it on the credit manager's desk. The credit manager refused to accept it. Subsequently, on the day after the defendant had received notice of the wage assignment, Lafreniere again went to the store of plaintiff accompanied by Mr. George Merchant, secretary and treasurer of the defendant, and again the credit manager was told that Lafreniere did not want the watch, that he was a minor and could not pay for it; and the watch was again tendered back but it was refused.

On motion all of this testimony was stricken out on the ground that infancy being a personal defense, it therefore could not avail defendant; that the suit is between Lafreniere and his employer, the defendant, for wages due.

The cases cited by plaintiff are not applicable to the present case. In Wright et al. v. Buchanan, 237 Ill. 468, an action was brought against certain persons who were minors. It was there held that the right of an infant to avoid a contract is personal and that the adult with whom he deals cannot take advantage of this in a suit at his instance, for the minor has the option to affirm the contract. In Chiappe v. Devaney, 135 Ill. App. 422, it is held that in an action by a minor to recover a consideration by him paid under a contract to purchase real estate, which he had disaffirmed, his cocontractors were not necessary parties because the plea of infancy was not available to them.

It is a well settled rule that an infant has the power to disaffirm any contract made by him other than for necessities. Wuller v. Chase Grocery Co., 241 Ill. 398. The contract of purchase

and the assignment of wages were voidable, and when they were disaffirmed they became invalid.

Furthermore, the stricken evidence showed that the minor paid his earnings to his parents, who were entitled to them. He therefore had no power to assign such earnings. Ford v. McVay, 55 Ill. 119; C. & G. T. R. Co. v. Gacynowsky, 155 Ill. 189; McMahon v. Sankey, 133 Ill. 636. In Sou. Ry. Co. v. King Bros. & Co., 136 Ga. 173, it was claimed that as the plea of infancy is personal it is not available to the railroad company, the minor's employer. It was held that the minor's wages were legally due to the father and that the assignment under the circumstances was ineffectual. In Greider v. C. & E. I. Ry. Co., 140 Ill. App. 246, a minor signed a written order upon his employer authorizing his employer to make certain payments to a third party with whom the minor had made a contract. It was held that the minor could make no contract that would bar the right of his mother to his wages. See also McDonald v. City of Spring Valley, 285 Ill. 52. The trial court improperly struck the evidence of the defendant proving that the earner was a minor at the time of the purchase contract and assignment, and that the same had been disaffirmed.

In a number of cases in other jurisdictions it has been held that where a minor disaffirms an assignment of wages, the invalidity of the assignment may be availed of by the defendant in any suit brought thereon. Sou. Ry. Co. v. King Bros. & Co., *supra*. In Peck v. Cain, 27 Tex. Civ. App. 38, it is said that while infancy is a personal privilege, however, after an infant has disaffirmed the contract anyone may take advantage of such disaffirmance for the reason that when the contract has been disaffirmed it is as though it had never existed. See also 5 C. J 1001. A case

and the assignment of work was visible, and when they were
 assigned they became invisible.
 Furthermore, the station evidence showed that the
 minor paid his earnings to his parents, who were entitled to
 them. He therefore had no power to assign such earnings. Id.
Y. B. v. Y. B., 100 N. E. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

involving the same principle is Colonial Bank v. George Sutton, 139 N.Y.S. 1002. The defense presented met the case made by plaintiff and judgment for defendant should have followed.

The plaintiff has incorporated in its brief a motion that the bill of exceptions be stricken. We will not entertain motions which appear only in the brief. Rule 15 of this court controls the manner in which such motions should be made.

For the reasons above indicated the judgment is reversed and judgment for the defendant is entered in this court.

JUDGMENT REVERSED AND JUDGMENT
ENTERED IN THIS COURT.

O'Connor, P. J., and Hatchett, J., concur.

Involved in the case of the United States v. General

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35161

THOMAS J. GRADY,
Appellant,

vs.

EILEEN GRADY,
Appellee.

204217
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 619³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is supplementary to the controversy between these parties which was considered in case No. 35071, in which an opinion has been this day filed. It will therefore be unnecessary to state the facts further than to say that upon the entry of the decree on January 24, 1931, the complainant husband, Thomas J. Grady, prayed an appeal therefrom to this court, which was allowed on January 26, 1931; that on the same day Mrs. Grady filed her petition setting up the appeal by her husband from said decree; that she had no property or funds to defray necessary expenses in following the appeal to a higher court; that she is living on the charity of others; that complainant was a man of considerable wealth and able to advance necessary costs and funds to enable her to employ counsel on appeal; that it was necessary for her to employ counsel to protect her interests, and praying for an order on complainant for solicitor's fees and necessary expenses for printing and filing briefs. An order was entered by the court directing that Thomas J. Grady pay to her \$1000 for that purpose within thirty days. From that order this appeal has been prosecuted.

It is urged for reversal that there is no proof in the record as to the ability of the husband to pay or of the amount necessary, or as to the customary and usual charge, and that such evidence should be preserved in a certificate of

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THESE RESULTS HAVE BEEN REPRODUCED BY OTHER RESEARCHERS.

910 A143

This appeal is respectfully to the court. The court is respectfully requested to grant the appeal and to set aside the order of the court below. The court below has erred in its judgment and in its application of the law. The court below has failed to consider the facts and circumstances of the case and has failed to apply the law correctly. The court below has also failed to consider the public interest in the case. The court below has acted arbitrarily and capriciously. The court below has acted in violation of the law. The court below has acted in violation of the constitution. The court below has acted in violation of the principles of justice. The court below has acted in violation of the rights of the parties. The court below has acted in violation of the public interest. The court below has acted in violation of the law. The court below has acted in violation of the constitution. The court below has acted in violation of the principles of justice. The court below has acted in violation of the rights of the parties. The court below has acted in violation of the public interest.

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evidence or the decree should recite the findings of the necessary facts. It is also urged that on the authority of Seeger v. Seeger, 154 Ill. App. 38, and Spitler v. Spitler, 108 Ill. 120, it is improper to allow temporary alimony and solicitor's fees to the wife where the case is not decided in her favor or where because of her conduct she was denied solicitor's fees in the trial court. Spitler v. Spitler, supra, involved the petition of the wife for permanent alimony where the husband had obtained a decree of divorce against her for desertion and cruelty. It appeared from the evidence that on the marriage she had brought no means with her; that her husband had been a good provider; that the children born to them were all grown and married; that she had deliberately abandoned her husband and home for the society of her paramour, and the court, of course, held that she was not entitled to permanent alimony. This petition is in the nature of a request for alimony pendente lite in order that the rights of the wife might be properly presented and that she might obtain justice.

Seeger v. Seeger, supra, is a case where a final decree had been entered against the wife, and she appealed. She had property of her own. The court denied her request for solicitor's fees to prosecute her appeal, and the Appellate court affirmed the order. The facts of that case are easily distinguishable from those appearing here, since on one phase of her suit Mrs. Grady was successful. She defeated her husband's attempt to secure a divorce, and the husband having appealed from that decree and she being without means, was entitled to funds with which to follow the appeal taken by him.

We are not impressed with the contention that the record is devoid of evidence as to the amount needed and the ability of the husband to pay. The Judge who entered the order had before him the voluminous record of the trial and the pleadings

of the parties under oath, from which we think he was fully advised as to the order which should be entered. Moreover, the order made was in the nature of an allowance for solicitor's fees pauca et lite, and we think it is not the usual practice to take oral evidence as to the amount which should be allowed in such cases unless the defendant demands the right to answer. (Jones v. Jones, 111 Ill. App. 396.)

The record in the principal case is before us, and in view of the size of it and the importance of the issues involved and the established ability of the complainant to pay, we think the allowance exceedingly modest.

The order is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

35184

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JAMES COHN,
Plaintiff in Error.

227
ERROR TO CRIMINAL COURT
OF COOK COUNTY.

264 I.A. 619⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

At the April 1930 term an indictment was returned against defendant, James Cohn, ~~and one Marie Gamble~~. The indictment was in two counts, the first alleging conspiracy to obtain money from divers persons by means of a confidence game, and the second averring that from April, 1929, to July 15, 1929, defendant unlawfully, etc., confederated and agreed with Marie Gamble and other unknown persons to obtain money by false pretenses from Mary Cohn, Mary Daly, Jerry Sullivan, Mary Farrell and other unknown persons desiring to be appointed and employed in the classified civil service positions of the City of Chicago. The second count further averred that each of these persons, and also other persons related by blood or marriage to them, had theretofore taken or was about to take civil service examinations as to their fitness and qualifications for positions and employment, and that the exact amount of moneys was unknown to the grand jurors.

There was a motion to quash the indictment which was overruled. Defendant and Marie Gamble pleaded not guilty, and the cause was tried by a jury. Upon trial the State dismissed as to the first count, and in the presence of the jury granted immunity to Marie Gamble from any prosecution that could arise from testimony that she might give in the case, and she thereupon became a witness for the State. The jury returned a verdict finding defendant, James Cohn, guilty and fixing his punishment at confinement in the county

1918

STATE OF ILLINOIS
County of Cook

IN SENATE

OF COOK COUNTY.

IN SENATE
OF COOK COUNTY.

2041 A. 119

IN SENATE

At the April 1918 term an indictment was returned against ~~James Lewis, and one John Lewis~~. The indictment was in two counts, the first alleging conspiracy to obtain money from diverse persons by means of a confidence game, and the second asserting that from April, 1917, to July 11, 1918, unlawfully, etc., consorted and agreed with Marie Gamble and other unknown persons to obtain money by false statements from persons desiring to be appointed and employed in the classified civil service positions of the City of Chicago. The second count further asserted that each of these persons, and also other persons related by blood or marriage to them, had nevertheless taken or was about to take civil service examinations as to their fitness and qualifications for positions and employment, and that the exact amount of money was unknown to the grand jurors.

There was a motion to quash the indictment which was overruled. Defendant and Marie Gamble pleaded not guilty, and the cause was tried by a jury. Upon trial the state declined to call the first count, and in the presence of the jury granted immunity to Marie Gamble from any prosecution that could arise from testimony that she might give in the case, and the defendant became a witness for the state. The jury returned a verdict finding defendant, James Lewis, guilty and fixing his punishment at confinement in the county

jail for a period of thirty days and the amount of fine at \$2,000, in default of payment of which defendant should be confined to jail until the fine was paid.

There was evidence from which a jury would have been justified in believing the following facts:

Marie Gamble met defendant Cohn in the year 1928 at a political headquarters in the LaSalle hotel, Chicago. She was at that time employed in the corporation counsel's office of the City of Chicago. She met defendant from time to time at the hotel LaSalle and the hotel Sherman. In the fall of 1929, she says, Cohn asked her if she knew any one who had taken the civil service examinations. When she told him that she knew no one who had, defendant said that if she knew any such one she should let him know and that he could make some money on it. She had further conversations with him along the same line. He told her that he had an "in" with the civil service commission whereby he could get positions. Afterwards he named to Mrs. Gamble the amounts which would be required to obtain different positions, but she does not remember how much was to be paid for each. Later Mrs. Gamble was called on the telephone by her friend, Mrs. Nellie Bolton. Mrs. Bolton talked to Mrs. Gamble about some persons who wished to obtain positions, and Mrs. Gamble then told Cohn what Mrs. Bolton had said to her about the matter. She asked Cohn if it was legitimate for him to do this, and he said it was. She said she did not want to get into any trouble and would call Mrs. Bolton and tell her that. Cohn replied, "Don't be a child. It is done every day." Mrs. Gamble asked, "You are quite sure, Mr. Cohn?" to which Cohn replied, "Positively." Cohn said that whatever amount of money she could get would be all right. Then Mrs. Gamble called Mrs. Bolton and went to her house where she met Mrs. Farrell, Jerry Sullivan and Mary Daly. She again went back to Cohn and asked him if it was all right to take

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There was evidence from which a jury would have been
justified in believing the following facts:

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their money. The first money obtained was \$350 from Mary Farrell which Mrs. Gamble took and gave to Cohn. He said it was legitimate or he would not do it. Mary Farrell desired to obtain the position of bridge tender for her husband, and Cohn told Mrs. Gamble that he would get this position, which was under civil service. Out of the \$350 Cohn gave Mrs. Gamble \$150. Mrs. Gamble gave Mrs. Farrell a receipt for the money. When the civil service list was published, Mr. Farrell's name did not appear on the list. Mrs. Gamble talked to Cohn about the matter and asked him why, and he replied that the name did not have to be on the list and that with the "in" he had it would be all right. Later Mrs. Farrell wrote Mrs. Gamble a letter which she showed to Cohn, who said that he would get Mrs. Farrell's money and refund it; however, he never did this.

About three or four weeks after the transaction with Mrs. Farrell, Mrs. Gamble met Jerry Sullivan at Mrs. Belton's. Sullivan paid her \$600 in cash. She explains that defendant Cohn had told her a number of times that he did not want any checks. Mrs. Gamble met Cohn in the lobby of the Sherman hotel with the \$600. Prior to that time she had asked him if it was all right to take this money and if he could do as he promised, and as he answered, "Positively," she turned the money over to him. When she told Cohn that Sullivan would pay \$600 for this position, Cohn said, "Fine." Mrs. Gamble gave Sullivan a receipt for the \$600. She gave it all to Cohn and he gave her back \$150. Later when it appeared that Sullivan's name was not on the list for a position, Cohn told her it didn't matter whether it was on the list or not, he would get the position just the same. Afterwards in the coffee shop of the Hotel Sherman, Mrs. Gamble had a conversation with Cohn in the presence of a Mrs. Martini and told him that the names were not on the list. He said she did not need to worry; that he would get Sullivan a job. Later

their money. The first money obtained was \$250 from Mrs. Farrell which Mrs. Gamble took and gave to John. He said it was legitimate or he would not do it. Mrs. Farrell desired to obtain the position of bridge tender for her husband, and John said Mrs. Gamble that he would get this position, which was under civil service. But of the \$250 John gave Mrs. Gamble \$150. Mrs. Gamble gave Mrs. Farrell a receipt for the money. When Mrs. Farrell saw the receipt, Mr. Farrell's name did not appear on the list. Mrs. Gamble talked to John about the matter and asked him why, and he replied that the name did not have to be on the list and that with the "in" he had it would be all right. Later Mrs. Farrell wrote Mrs. Gamble a letter for which she showed no John, who said that he would get Mrs. Farrell's money and return it; however, he never did.

When Mrs. Farrell saw the receipt, she was dissatisfied with it. Mrs. Gamble met Jerry Sullivan at Mrs. Hoffman's. Sullivan paid her \$500 in cash. She explained that defendant John had told her a number of times that he did not want any more. Mrs. Gamble met John in the lobby of the Sherman Hotel with the \$500. Prior to that time she had asked him if it was all right to take this money and if he would be as he promised, and as he answered, "Yes," she told the money was in his hand. When she told John that Sullivan would pay \$500 for this position, John said, "Fine." Mrs. Gamble gave Sullivan a receipt for the \$500. She gave it all to John and he gave her back the list. Later when it appeared that Sullivan's name was not on the list for a position, John told her it didn't matter whether it was on the list or not, he would get the position just the same. Afterwards in the winter when at the Hotel Sherman, Mrs. Gamble had a conversation with John in the presence of a Mr. Kettner and told him that the money was not on the list. He said she did not need to worry; that he would get Sullivan a job. Later

he said he would get the position or refund the money.

Mrs. Gamble also talked with Mary Daly in Mrs. Belton's home and afterwards spoke to Cohn about it. She asked Cohn if he could get Mr. Daly the position of engineer through the civil service. The price fixed for this was \$300, which Mrs. Daly paid to Mrs. Gamble. Mrs. Gamble gave this money to Cohn in the lobby of the hotel Sherman about July, 1929. She gave a receipt to Mrs. Daly, and when she gave the money to Cohn she told him that it was Mr. Daly's money for the position as engineer of the school, and Cohn said he would get it for him. Later she asked Cohn why Daly's name was not on the list. He told her she didn't need to worry as it would all be taken care of. Out of this money Mrs. Gamble received \$150 and Cohn took the rest of it. Mrs. Gamble also asked about a position for Mary Cohen as junior clerk; she had taken the civil service examination; Cohn said he could get the position for her. Mary Cohen paid \$150 to Mrs. Gamble who gave her a receipt. A few days after she received the money she gave it to Cohn.

As Mrs. Martini wanted to get two positions for people in her ward, Mrs. Gamble talked to Cohn about that. One of these positions was for a Mrs. Brown, who had taken the civil service examination for bus attendant. Cohn said he would get it and that he would take \$150 to do so. Mrs. Gamble asked Cohn if he could get a job as engineer in a school for a man who lived in Mrs. Martini's ward who had taken an examination for that position; Cohn said he could and stated the price to be \$150, which Mrs. Gamble received from Mrs. Brown and gave it to Cohn who gave \$50 back to Mrs. Gamble. In the presence of Mrs. Gamble, Mrs. Martini had a conversation with Cohn in the coffee shop of the hotel Sherman; Mrs. Martini then asked Cohn how he was going to get these jobs and Cohn replied that he would get them through John Jarnowski.

The testimony of Mrs. Gamble as to the amounts of

he said he would pay the position at twenty the money.

Mrs. Gamble also talked with Mary Kelly in New York.

John's name and afterwards spoke to John about it. She asked John if he would get Mr. Kelly the position of engineer through the civil service.

also. The price fixed for this was \$200, which Mrs. Kelly said to

Mrs. Gamble. Mrs. Gamble gave this money to John in the lobby of

the Hotel Sherman about July, 1900. She gave a receipt to him.

July, and when she gave the money to John she told him that it was

Mr. Kelly's money for the position as engineer of the canal, and

John said he would get it for him. Later she asked John why Kelly's

name was not on the list. He told her the list's need so many as

it would be to have more of. And at this time Mrs. Gamble said

about this and John took the rest of it. Mrs. Gamble also asked

about a position for Mary Cohen as Junior clerk; but had taken the

with service examination; John said he would get the position for

her. Mary Cohen paid him to Mrs. Gamble who gave her a receipt.

A few days after she received the money she gave it to John.

As Mrs. Martini wanted to get the position for people

in New York, Mrs. Gamble talked to John about that. One of these

positions was for a Junior Clerk, and John said she should

examination for that position. John said he would get it and

that he would take him to do so. Mrs. Gamble asked John if he could

get a job as engineer in a hospital for a man who lived in New York.

with who had taken an examination for that position; John said he

would and asked Mrs. Gamble to be him. When Mrs. Gamble received

from Mrs. Brown and gave it to John she gave \$200 back to Mrs.

Gamble. In the summer of 1901, Gamble, Mrs. Gamble had a girl

interviewed with John in the office shop of the Hotel Sherman; Mrs.

Martini then asked John how he was going to get these jobs and

John replied that he would get them through John Lawrence.

The testimony of Mrs. Gamble as to the amount of

money she received, the times she received them, the persons from whom she received them is corroborated by receipts which were produced and by the testimony of Jerry Sullivan, James Farrell, Mary Farrell, Gerald Daly, Mary Daly, Mary Cohen and Emma F. Martini.

By way of defense defendant showed that he resided in Illinois for about four years, having prior to that time resided in New York City where he was born; that he was by profession a civil engineer, having received his training at Cornell university of which he was a graduate; that at the time of the trial he was secretary and treasurer of the Standard Tax Appraisal, Inc., and prior to that he had been with the government department of commerce for about three months; that before that he had been out of employment for a long time; that he had worked for the City of Chicago before he got out of employment; that his connection with the City of Chicago was severed about a month prior to the time he was arrested on the charge in this case; that when he worked for the government he was assistant product manager of the navy department. He testifies he met Marie Gamble in the fall of 1928 at the time of the campaign in which they were both interested, and admits he knew Mary Cohen and Mrs. Martini. He denies in particular the conversations with Mrs. Gamble to which she testified. He says he never talked to Marie Gamble about putting anybody to work or giving a civil service rating. He denies that he ever received any of the sums of money concerning which Mrs. Gamble testified; admits that he spoke to Mrs. Bolton in the coffee shop; denies that he ever said he would return the money he had received for the purposes stated by Mrs. Gamble, and denies the conversation concerning which Mrs. Martini and Mrs. Gamble testified and which they said took place in the coffee shop of the Sherman hotel.

This is, we think, a fair summary of the evidence as disclosed by the record.

money she received, the times she received the same, the persons from whom she received them, the persons who corroborated by receipts which were produced and by the testimony of Jerry Sullivan, James Farrell, Mary Farrell, Gerald Kelly, Mary Kelly, and John E. Kelly.

By way of defense defendant showed that he resided in Illinois for about four years, having prior to that time resided in New York where he was born; that he was by profession a civil engineer, having received his training at Cornell University at which he was a graduate; that at the time of the trial he was secretary and treasurer of the Standard Tax Appraisal, Inc., and prior to that he had been with the Government Department of War for about three months; that before that he had been in the employ of a long time; that he had worked for the City of Chicago before he got out of employment; that his connection with the City of Chicago was severed about a month prior to the time he was arrested in New York in 1935; that when he worked for the Government he was assistant product manager of the navy department. He testified he met Marie Gamble in the fall of 1935 at the time of the campaign in which they were both interested, and while he knew Mary Cohen and Mrs. Martin. He looked in particular the conversation with Mrs. Gamble to which she testified. He says he never talked to Marie Gamble about getting anybody to work on giving a civil service rating. He admits that he never received any of the part of money mentioned with Mrs. Gamble testified; admits that he spoke to Mrs. Nelson in the coffee shop; admits that he never said he would return the money he had received for the wife; admits he did not, and admits his conversation concerning which Mrs. Martin and Mrs. Gamble testified and which they said that there is no other part of the defense called.

This is, we think, a fair summary of the evidence as presented at the trial.

Defendant contends in the first place that since the charge made against him is conspiracy, by reason of the nature of the offense at least two persons, each with a common criminal intent and a common design to form a conspiracy, are required; that where two only stand charged and it appears on the trial that one of them is not guilty, the other must also be held not guilty. Defendant cites 5 R. C. L. 1065, 1066, which states the general rule of law in that regard. That rule, however, is not applicable to facts appearing here for two reasons. In the first place, Mrs. Gamble was not found to be not guilty; on the contrary she was granted immunity and testified for the State to facts and circumstances such as, if true, would conclusively establish not only the guilt of the defendant but also her own guilt. It is true that in the course of her testimony she denied that she ever entertained any criminal intent and explained that she relied upon defendant's explanation that the dealings in which they were both engaged were not forbidden by law. Of course, they were both conclusively presumed to know the law, and the specific intent to get the money from their dupes was established by her evidence. In the second place, the rule is not applicable for the reason that the indictment charges a conspiracy by Cohn, Marie Gamble and other unknown persons to obtain money, and the evidence which we have already recited tends to show that one of the unknown persons so conspiring with them was Mrs. Bellie Bolton. The rule to which defendant appeals, therefore, is not at all applicable to this record.

It is further contended that the facts established by the State show an entire absence of any agreement to use false pretenses; that there was no arrangement to set up and represent a false condition shown to have been made, and that no plan was formed to falsely represent a present existing or a past fact. It is urged that the activities of defendant and Mrs. Gamble were

Defendant contends in the first place that since the charge made against him is conspiracy, by reason of the nature of the offense of least two persons, each with a common criminal intent and a common design to form a conspiracy, are required; that where two only stand charged and it appears on the trial that one of them is not guilty, the other must also be held not guilty. Defendant states that the law is not applicable to that rule, however, in the first place, and that the evidence here for two persons, in the first place, and that the evidence was not found to be not guilty; on the contrary the evidence established immunity and justified for the State to look and circum- stances such as, if true, would conclusively establish not only the guilt of the defendant but also her own guilt. It is true that in the course of her testimony she denied that she ever con- sidered any criminal intent and explained that she relied upon defendant's explanation that the handling in which they were both engaged was not testimony by law. It is true, that they both were actively presumed to know the law, and the specific intent to get the money from their hands was established by her evidence. In the second place, the rule is not applicable for the reason that the defendant charges a conspiracy by John, Harry Gamble and other unknown persons to obtain money, and the evidence which we have already received tends to show that one of the unknown persons as defendant was not a party to the conspiracy. The rule is not applicable, therefore, in that it is not applicable to this case. It is further contended that the State established by the State show an entire absence of any agreement to use force or violence; that there was no arrangement to get up and represent a false condition shown to have been made, and that no plan was formed or falsely represented a person selected as a post-man. It is urged that the activities of defendant and Mrs. Gamble were

separate and that Mrs. Gamble developed her own field, made her own arrangements, procured the money and took it to defendant voluntarily. There was, defendant says, no conspiracy to get money from persons, and if Marie Gamble got money from them, it was her concern only and defendant could be charged only when she delivered it to him. Mrs. Gamble's evidence, it is said, is peculiarly blank as to what she told the persons from whom she took money, and it is not apparent from the evidence that there was any conspiracy to get money from these persons by any false pretences. It is argued that Mrs. Gamble got this money in her own way; that defendant did not conspire with her in that regard but that he simply entered into her arrangements and was just an agency to carry them out. In other words, there was no plan between them to get the money by any false pretences.

The record does not sustain this contention, but shows on the contrary that defendant did make false representations of an existing fact, namely, his ability to secure civil service positions. The testimony of Mrs. Gamble is that defendant told her that he had an "in" with the civil service commission and that he could "fix" it. This was a representation of an existing fact which the evidence discloses was untrue.

In People v. Koscielniak, 257 Ill. App. 514, this court recently held that a representation that a person by reason of his political connection could "fix" a criminal case then pending, was a representation of an existing fact. The rule there adopted is, we think, applicable here. It was not necessary, in order to establish defendant's participation in the conspiracy, to show that the parties to it made a definite and complete plan. In the comparatively recent case of People v. Blum, 259 Ill. App. 547, where four defendants were held guilty of a conspiracy, this

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own arrangements, received the money and took it to defendant
voluntarily. There was, defendant says, no compulsion to get money
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it to him. Mrs. Gamble's evidence, it is said, is completely clear
as to what she told the persons from whom she took money, and if it
had appeared from her evidence that they were not concerned in the
same, then there would be no case against them. It is argued that
Mrs. Gamble got this money in her own way; that defendant did not
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evidence indicates the truth.

In Exhibit A, Exhibit B, Exhibit C, Exhibit D, Exhibit E, Exhibit F, Exhibit G, Exhibit H, Exhibit I, Exhibit J, Exhibit K, Exhibit L, Exhibit M, Exhibit N, Exhibit O, Exhibit P, Exhibit Q, Exhibit R, Exhibit S, Exhibit T, Exhibit U, Exhibit V, Exhibit W, Exhibit X, Exhibit Y, Exhibit Z, Exhibit AA, Exhibit AB, Exhibit AC, Exhibit AD, Exhibit AE, Exhibit AF, Exhibit AG, Exhibit AH, Exhibit AI, Exhibit AJ, Exhibit AK, Exhibit AL, Exhibit AM, Exhibit AN, Exhibit AO, Exhibit AP, Exhibit AQ, Exhibit AR, Exhibit AS, Exhibit AT, Exhibit AU, Exhibit AV, Exhibit AW, Exhibit AX, Exhibit AY, Exhibit AZ, Exhibit BA, Exhibit BB, Exhibit BC, Exhibit BD, Exhibit BE, Exhibit BF, Exhibit BG, Exhibit BH, Exhibit BI, Exhibit BJ, Exhibit BK, Exhibit BL, Exhibit BM, Exhibit BN, Exhibit BO, Exhibit BP, Exhibit BQ, Exhibit BR, Exhibit BS, Exhibit BT, Exhibit BU, Exhibit BV, Exhibit BW, Exhibit BX, Exhibit BY, Exhibit BZ, Exhibit CA, Exhibit CB, Exhibit CC, Exhibit CD, Exhibit CE, Exhibit CF, Exhibit CG, 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same point was raised, and we said:

"It is true that there is no evidence that these four defendants all met together at a particular time and stated in detail the means whereby they were to defraud Shingleton Brothers, but such an understanding must be inferred from their acts. There was a common design and purpose in which Stein, Madig, Lee and Blume each performed their several parts. They were willing to defraud anybody, and under the leadership of Magid they were brought in contact with Shingleton Brothers and succeeded in defrauding them. This is sufficient evidence upon which to base a verdict in a conspiracy case. People v. Strauch, 240 Ill. 60; People v. Feindexter, 243 Ill. 68; People v. Walinsky, 300 Ill. 92."

As there, so here, each of these parties, the evidence indicated, performed his or her part towards the common end. Mrs. Bolton furnished the place at which they met; Mrs. Gamble carried the representations of defendant to the intended victims and defendant divided the proceeds obtained from their common enterprise with Mrs. Gamble, keeping the larger share for his own use. The false pretense in this case was the assertion by defendant, through his co-conspirator, Mrs. Gamble, that he had an "in" with the civil service commission and that he was able to furnish civil service positions irrespective of whether the applicants were entitled to them or not.

It is further contended that the evidence fails to show that this defendant is guilty beyond a reasonable doubt, and it is urged that defendant stands convicted upon the uncorroborated testimony of Marie Gamble, an alleged co-conspirator, who was promised immunity by the State in order to obtain her testimony. If defendant's guilt rested upon the testimony of Mrs. Gamble alone, without corroboration, this contention would require grave consideration, but the finding of guilt does not, as we read this record, depend upon the uncorroborated testimony of Mrs. Gamble. On the contrary, her story is corroborated by a large number of witnesses, by written evidence and by the fact that the history she narrates of this transaction seems under all the circumstances not unreasonable or

Chlorine gas, sulfur and other gases

THE 12th ANNUAL MEETING OF THE AMERICAN SOCIETY OF CLIMATE CONTROL ENGINEERS WAS HELD AT THE UNIVERSITY OF CALIFORNIA, BERKELEY, CALIF., ON SEPTEMBER 10-11, 1964. THE MEETING WAS ATTENDED BY 120 ENGINEERS AND SCIENTISTS FROM 15 COUNTRIES. THE MEETING WAS OPENED BY THE VICE CHAIRMAN OF THE SOCIETY, DR. J. H. HARRIS, WHO STATED THAT THE SOCIETY WAS FOUNDED IN 1952 AND HAD GROWN TO A MEMBERSHIP OF 1,200. HE STATED THAT THE SOCIETY WAS INTERESTED IN THE DEVELOPMENT OF CLIMATE CONTROL TECHNOLOGY AND IN THE APPLICATION OF THIS TECHNOLOGY TO THE PROBLEM OF CLIMATE CHANGE. HE STATED THAT THE SOCIETY WAS CURRENTLY WORKING ON A PROJECT TO DEVELOP A CLIMATE CONTROL SYSTEM FOR THE EARTH. HE STATED THAT THE SOCIETY WAS CURRENTLY WORKING ON A PROJECT TO DEVELOP A CLIMATE CONTROL SYSTEM FOR THE EARTH. HE STATED THAT THE SOCIETY WAS CURRENTLY WORKING ON A PROJECT TO DEVELOP A CLIMATE CONTROL SYSTEM FOR THE EARTH.

At those, no more of these parties, the evidence indicated, performed his or her part between the common wall. Before testimony was given at which both had been sworn during the investigation of defendant to the alleged victim and before and against the person charged with such serious offense with Mrs. Gamble, keeping the latter aware for his own use. The false promise in fact came from the suggestion by defendant, through his co-conspirator, Mrs. Gamble, that he had an "in" with the civil service commission and that he was able to furnish civil service positions irrespective of whether the applicants were qualified to them or not.

[illegible]

improbable. Her testimony is corroborated also by the testimony of Mrs. Martini, the only person other than Mrs. Gamble and Mrs. Bolton, who seems to have come in direct contact with defendant in these transactions. The relations of Mrs. Martini and Mrs. Gamble to defendant do not appear to have been unfriendly. No sufficient motive is disclosed for their accusation of defendant if he was innocent. It is true, as defendant suggests, Mrs. Gamble does not appear to have been a person of high ideals, and this is shown by the fact that she made application for ^acivil service job, while she had another person take the examination in her name. This suggestion does not, in our opinion, help defendant's case and, apparently, the jury so regarded it. These conspirators were well and continuously acquainted with each other. They were not unfriendly, and the impression produced by a careful examination of the record is that they were both guilty beyond any reasonable doubt. We do not forget that good character is to be presumed without proof to the contrary, but that rule has little weight as against positive testimony consistent with all the facts and circumstances appearing. Defendant has had the benefit of a fair trial by jury, and the verdict of the jury has been approved by a Judge who saw and heard the witnesses. We have no reasonable doubt of his guilt.

It is further urged in behalf of defendant that while the indictment charged a conspiracy to defraud certain persons, the evidence in fact showed a conspiracy to defraud the public generally, and that for this reason there is a variance. Although the indictment does not allege a conspiracy to defraud the public generally, it alleges a conspiracy to defraud certain persons named and other persons unknown to the jury. People v. Lowell, 239 Ill. 227, cited and relied on, is therefore not in point.

The judgment of the trial court is affirmed.
AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

35339

THOMAS J. GRADY,
Complainant,

vs.

EILEEN GRADY,
Defendant.

EILEEN GRADY,
Cross-Complainant,
Appellee,

vs.

THOMAS J. GRADY and PETER MAGUIRE,
Cross-Defendant,
Appellants.

2 3 7
INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 620'

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is in sequence to litigation between Thomas J. Grady and Eileen Grady, as will appear from the opinions filed this day in causes numbers 35071 and 36161.

The record here discloses that on October 27, 1930, upon a petition filed by Eileen Grady against her husband, Thomas J. Grady, and Peter Maguire, an order was entered that an injunction issue without bond restraining them, their agents, etc., from proceeding with a certain cause then pending in the Municipal court of Chicago, entitled Peter Maguire v. Eileen Grady, and from interfering in any manner with Mrs. Grady's use of the second apartment at 6334 North Francisco avenue, Chicago, Illinois, in which she resided and from calling at the apartment or from molesting or interfering in any manner in the possession of the same until the further order of the court, in accordance with the prayer of the bill of complaint filed by her. On January 24, 1931, a final decree was entered in the litigation between Mr. and Mrs. Grady with reference to their marital rights. The bill of the husband and the crossbill of the wife were both dismissed for want of equity. On March 23rd thereafter it appears that Peter Maguire was given

1934

THOMAS J. GRADY, Plaintiff

vs.

WILLIAM W. GRADY, Defendant

Case No. 100

Filed for Record

43

THOMAS J. GRADY, Plaintiff
vs.
WILLIAM W. GRADY, Defendant

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1934

This appeal is in response to litigation between Thomas J. Grady and William W. Grady in this court from the evidence filed this day in cases numbers 38071 and 38181.

The record here discloses that on October 27, 1933, when a petition filed by William W. Grady against his husband, Thomas J. Grady, and their daughter, as their first and only child in litigation, issue without bond restraining them, their agents, etc., from disposing of certain real estate then pending in the Municipal Court of Chicago, entitled Thomas J. Grady vs. William W. Grady, and the said Grady in any manner with Mrs. Grady's one of the second apartments at 5854 North Francisco Avenue, Chicago, Illinois, in which she resided and from selling or any agreement or from disposing or otherwise in any manner in the possession of the same until the further order of the court, in accordance with the terms of the bill of complaint filed by her. On January 24, 1934, a final decree was entered in the litigation between Mr. and Mrs. Grady with reference to their married estate. The bill of the husband and the affidavit of the wife were both received for filing at the same time and thereafter it appears that the wife's affidavit was given

leave to enter a special appearance for the purpose of making a motion to dissolve this injunction. The motion was entered and hearing set for April 4, 1931, and continued from time to time thereafter until May 23, 1931, when the court entered an order overruling and denying the motion. From the entry of that order this appeal has been prosecuted.

It is urged in behalf of Maguire that since the final decree was entered in that case the injunction should be dissolved ^{because} merely ancillary to the principal relief sought by the bill; that the dismissal of the bill of necessity worked a dissolution of the injunction inso facto. High on Injunctions, vol. 2, sec. 1476, and Billboard Publishing Co. v. McCarahan, 192 Ill. App. 384, are cited and state the undoubted general rule in that regard. It appears, however, that that phase of the litigation with reference to which this injunction was issued was not settled by that decree, but on the contrary that the matter has been referred to a master to take proofs and ascertain the rights of the parties. The rule is therefore not applicable, and Maguire made no showing which would justify the dissolution of the injunction.

The order of the Superior court is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

35352 - 35353

O. C. JACOBSEN doing business
as AMERICAN BROKERAGE CO.,
Defendant in Error,

vs.

MIDWEST TRADING AND SECURITIES
CORPORATION, INC.,
Plaintiff in Error.

24 7
264 I.A. 620²

ERROR TO MUNICIPAL COURT
OF CHICAGO.

ELSOR HEATER, doing business as
NATIONAL COMMISSION COMPANY,
Defendant in Error,

vs.

MIDWEST TRADING AND SECURITIES
CORPORATION, INC.,
Plaintiff in Error.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

These causes, which involve the same issues, were by stipulation tried together in the Municipal court and have been consolidated for hearing in this court. Plaintiffs, Jacobsen and Heater, sued defendant corporation for the value of services alleged to have been rendered by them in the way of commissions earned on sales of feedstuffs which, plaintiffs say, they made as brokers at defendant's request. There was a trial by the court and findings in favor of the plaintiffs - for Jacobsen in the sum of \$177.52 and for Heater in the sum of \$200. Judgment was entered on each finding, and these judgments defendant seeks to reverse by this writ of error.

The claims for commission were based upon certain sales made and transactions had under the name of Midwest Commercial Company. Defendant contends that one Frank T. Liddy was doing business under that name and that he alone is liable in these transactions.

PAGE 2 - 12345

J. E. LAMBERT, JR.,
OF THE FIRM OF LAMBERT, JR. & CO.,
NEW YORK, N. Y.

BY

ALBERT LAMBERT, JR.,
OF THE FIRM OF LAMBERT, JR. & CO.,
NEW YORK, N. Y.

ALBERT LAMBERT, JR.,
OF THE FIRM OF LAMBERT, JR. & CO.,
NEW YORK, N. Y.

BY

ALBERT LAMBERT, JR.,
OF THE FIRM OF LAMBERT, JR. & CO.,
NEW YORK, N. Y.

2841 A. 630

IN WITNESS WHEREOF,
I have hereunto set my hand and seal
this 1st day of January, 1911.

BEFORE ME, the undersigned authority, on this 1st day of January, 1911, personally appeared ALBERT LAMBERT, JR., known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 1st day of January, 1911.

Notary Public in and for the State of New York.

THE ALBANY COUNTY COMMISSIONERS have caused this copy to be made and filed for record in the office of the County Clerk of Albany County, New York, this 1st day of January, 1911.

Plaintiffs on the other hand contend that Liddy was in fact the agent and servant of defendant, trading and transacting business for defendant in the name of Midwest Commercial Company, and that defendant is therefore liable to plaintiffs for the commissions earned by them. Defendant does not contend that the findings of the court are against the manifest weight of the evidence. Rather its contention is that the evidence, which is practically uncontradicted, was entirely insufficient to sustain the findings. It is also contended that the court erred in its rulings upon the admission of evidence offered by plaintiffs, but since the trial was by the court without a jury an error of this kind would not be reversible provided there was other sufficient and competent evidence to sustain the findings of the court.

The facts seem to be that the defendant corporation was first organized under the laws of Delaware under the name Midwest Securities and Trading Corporation. It applied for license to do business in Illinois and the secretary of the state refused to allow the use of that name and changed it to the Midwest Trading and Securities Corporation. The principal place of business of the defendant corporation is at Nos. 923 and 924 Utilities Building, Chicago. James D. Swan, Jr., is president, Erwin R. Brigham, vice-president, and M. E. Scott, secretary-treasurer. Erwin R. Brigham took the place of his father, M. E. Brigham, who prior to his death January 24, 1930, had been vice-president of the corporation and also an officer of the North American Car Company, which company had offices in the same room as the defendant corporation. M. E. Brigham had also been the owner of the Turtle Valley Farms at Walworth, Wisconsin, and operated a mill there in which feedstuffs were manufactured.

Frank T. Liddy, who at one time resided on a farm in

liability on the other hand, evidence that it is in fact the agent and servant of defendant, trading and transacting business for defendant in the name of Midwest Commercial Company, and that defendant is therefore liable to plaintiff for the commission earned by him. Defendant does not contend that the findings of the court are against the weight of the evidence. Rather its contention is that the evidence, which is practically uncontroverted, was improperly admitted to establish the findings. It is also contended that the jury acted in its verdict upon the admission of evidence offered by plaintiff, but since the trial was by the court without a jury no error of this kind could be reversible prejudice. There was other evidence and competent evidence to establish the findings of the court.

The facts seem to be that the defendant corporation was first organized under the laws of Delaware under the name Midwest Securities and Trading Corporation. It acquired the license to do business in Illinois and the secretary of the state refused to allow the use of that name and changed it to the Midwest Trading and Securities Corporation. The principal place of business of the defendant corporation is at Nos. 225 and 224 Illinois Building, Chicago. James H. Ryan, Jr., is president, Edwin A. Brigham, vice-president, and H. M. Scott, secretary-treasurer. Edwin A. Brigham has the place of his father, H. A. Brigham, who prior to his death owned the stock of the corporation and had been vice-president of the corporation and also an officer of the North American Fur Company, which company had offices in the same room as the defendant corporation. H. A. Brigham had also been the owner of the Middle Valley Farm at Tipton, Illinois, and operated a mill there in which defendant's wife resided.

Exhibit 1, 1937, and 2, 1937, are the same as A and B.

Indiana, had a conversation in February, 1929, with H. H. Brigham in the offices of the defendant corporation when, he says, Brigham told him a lot of things he had in mind about going into the molasses business and that he wished Liddy to go into the office and work with the Turtle Valley Farms and also to operate a feed business under the name of the Midwest Commercial Company. Brigham then took Liddy into defendant's office, showed him the desk he was to use and handed Stott, the secretary-treasurer, a letter which he had dictated to his stenographer addressed to Stott, stating that Liddy was to work for \$50 a week and receive 10% of the profits at the end of the year. That was in the latter part of February, 1929. Brigham told Liddy they had stationery marked "Midwest Commercial Company" which he could use. Shortly thereafter H. H. Brigham sent Liddy for a two days' trip to look over the mill at Walworth, Wisconsin, and paid his expenses. When he returned from Wisconsin Liddy commenced buying and selling feedstuffs in the name of the Midwest Commercial Company and continued to do so until June, 1930. These transactions were all conducted at 327 South LaSalle street in the offices occupied by the defendant corporation. The Midwest Commercial Company had no corporate existence, kept no books and had no bank account. Defendant Midwest Securities and Trading Company had two bank passbooks showing transactions with the Central Trust Company of Illinois, where it kept its bank account. These passbooks are in evidence as Exhibits 53 and 54. The evidence shows that Liddy used the passbooks in conducting the business and that when checks and drafts were received by the Midwest Commercial Company Liddy turned them over to Stott, who made out deposit slips, took the checks and drafts to the bank and deposited them in defendant's account. Liddy says that he delivered such checks and drafts to Stott every

Indiana, had a conversation in February, 1933, with W. W. Brigham
in the office of the defendant's attorney, at which time
he said that he had a lot of things to say about going into the
business and that he wished to go into the office
and work with the Purple Valley town and also to operate a bank
business under the name of the Purple Valley town. He
then took him into defendant's office, showed him the bank
he was to see and handed him the necessary documents, a letter
which he had dictated to his stenographer addressed to him,
saying that he had a lot of things to say about going into the
of the office at the end of the year. There was in the latter
part of February, 1933. Brigham said that they had previously
heard of the Purple Valley town, which he said was really
thereafter W. W. Brigham went with him for a few days' trip to look
over the mill at Milwaukee, Wisconsin, and said his expenses.
When he returned from Wisconsin he had commenced buying and selling
stocks in the name of the Purple Valley town, and was
found to do so until June, 1933. These transactions were all
conducted at 324 South Madison street in the office occupied by
the defendant's attorney. The Purple Valley town had no
corporate existence, kept no books and had no bank account. The
defendant himself received and taking money and two bank pass-
books from the transactions with the Purple Valley town, namely at
Indianapolis, where it had its bank account. These passbooks were in
evidence as Exhibits 52 and 53. The evidence shows that Brigham used
the passbooks in conducting the business and that when money was
taken from the bank to the Purple Valley town, it was taken from
the bank and deposited in the bank and deposited in the bank and
Brigham says that he believed that money was taken from the bank

day as they came in. The drafts drawn against purchasers to whom produce was sold in the name of the Midwest Commercial Company were made out in the name of the Midwest Trading and Securities Company and each time a draft with bill of lading covering shipment was drawn on the Midwest Commercial Company, defendant's check was given. In other words, the entire banking business of the Midwest Commercial Company was done in the name of the defendant Midwest Trading and Securities Corporation. All drafts and checks received by Liddy and by the Midwest Commercial Company were turned over to Stott and were endorsed to the Midwest Trading and Securities Corporation and deposited in their account. Liddy, who was managing the Midwest Commercial Company, never signed any checks, never endorsed any checks and never signed the name of the Midwest Commercial Company to any checks. His position seems to have been that of the manager of the Midwest Commercial Company, but he at no time invested any money in that concern. Every two weeks Liddy received a salary of \$108.33 for his services from the defendant corporation.

Plaintiff Jacobsen dealt as broker with Liddy. He made sales for the Midwest Commercial Company, which ^{are} represented by plaintiff's Exhibits 1 to 18, showing a total brokerage commission of \$277.50, on which the sum of \$100 was paid by check of the defendant corporation.

Defendant paid not only the salary of the manager but also all bills for telegrams, freight charges and feedstuffs in transactions conducted in the name of the Midwest Commercial Company. It was stipulated by the parties on the trial that there were several hundred checks signed by defendant corporation for the Midwest Commercial Company bearing the signatures of James Swan, Jr., and M. M. Scott. It appears that from the beginning of Liddy's connection with defendant in February, 1928, up to June 5, 1930,

they as they came in. The goods were again purchased to them
produce was sold in the name of the Midwest Commercial Company very
made out in the name of the Midwest Trading and Mercantile Company
and each time a bill of lading covering shipment was
given in the name of the Midwest Commercial Company, although it was not
given. In other words, the entire banking business of the Midwest
Commercial Company was done in the name of the defendant Midwest
Trading and Mercantile Corporation. All orders and checks received
by bill of lading and by the Midwest Commercial Company were turned over to
State and were returned to the Midwest Trading and Mercantile Cor-
poration and deposited in their account, which was the business
the Midwest Commercial Company, never signed any orders, never re-
ceived any orders and never signed the name of the Midwest Com-
mercial Company in any order. His position seems to have been that
of the manager of the Midwest Commercial Company, but he at no time
received any money in that capacity. Every few weeks bill of lading
a bill of lading for the Midwest Commercial Company, but the defendant corporation.
Midwest Commercial Company dealt as broker with bill of lading. He was
also for the Midwest Commercial Company, which was owned by him-
self's business 1 to 15, showing a total business connection of
\$250,000, on which the sum of \$100 was paid by check of the defendant
corporation.
Defendant said not only the salary of the manager but
also all bills for telephone, freight charges and insurance in
connection connected to the name of the Midwest Commercial Com-
pany. It was stipulated by the parties on the trial that there
were several bills of lading signed by defendant corporation for the
Midwest Commercial Company during the signature of James W. Brown, Jr.,
and J. W. Brown. It appears that from the beginning of 1914's
connection with defendant in February, 1922, up to June 8, 1923,

578 or more drafts of this kind were drawn on the Central Trust Company by defendant company to various payees for transactions in feedstuffs of the Midwest Commercial Company.

If a fact may be proved to the satisfaction of a court of law by the inductive method, this evidence would seem to establish beyond a doubt that Liddy managed the Midwest Commercial Company, as it was called, solely as the agent, employee and manager of defendant. He had no interest other than that in his salary and commissions which were paid by defendant according to the terms of his contract. The evidence indicates that where profits were realized these passed into the bank account of defendant, and it does not appear that Liddy or anyone other than defendant had any interest therein.

The finding of the trial court is sustained by a preponderance of the evidence, and the judgment of the court is affirmed.

AFFIRMED.

O'Connor, P. J., and McBurely, J., concur.

35353

ELSOR HEATER, Doing Business as
NATIONAL COMMISSION COMPANY,
Defendant in Error,

vs.

MIDWEST TRADING AND SECURITIES
CORPORATION, INC.,
Plaintiff in Error.

257
ERROR TO MUNICIPAL COURT
OF CHICAGO.

264 I.A. 620³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with No. 35352, in which an opinion has been filed this day affirming the judgment of the trial court. The issues in the two cases are identical, and for the reasons stated in the opinion filed in that case, in this case also the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

THE UNITED STATES OF AMERICA
 DISTRICT COURT OF THE DISTRICT OF COLUMBIA
 IN RE: [Name Redacted]

vs.

THE UNITED STATES OF AMERICA
 DISTRICT COURT OF THE DISTRICT OF COLUMBIA
 IN RE: [Name Redacted]

THE UNITED STATES OF AMERICA
 DISTRICT COURT OF THE DISTRICT OF COLUMBIA
 IN RE: [Name Redacted]

1925

THE UNITED STATES OF AMERICA
 DISTRICT COURT OF THE DISTRICT OF COLUMBIA
 IN RE: [Name Redacted]

This case was submitted for hearing with the
 record, including the exhibits and the testimony
 of the witnesses. The facts of the case are as
 follows: [Name Redacted] was born on [Date Redacted]
 at [Location Redacted]. He is now residing at [Address Redacted].
 He is a [Occupation Redacted] and has been employed by [Company Redacted]
 since [Date Redacted]. He has been married to [Name Redacted] on [Date Redacted].
 They have two children, [Name Redacted] and [Name Redacted].

is attested.

WITNESSES:

Subscribed and sworn to before me this [Date Redacted] day of [Month Redacted], 1925.

35362

W. E. MOWER,
Defendant in Error,
vs.
EWALD WIRTHS,
Plaintiff in Error.

267
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 620⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$9500 entered upon the verdict of a jury in an action on the case for personal injuries.

It is urged for reversal that plaintiff failed to establish the fact of due care on his part; that he was guilty of contributory negligence and that an instruction requested by defendant at the close of all the evidence should have been given for that reason. It is contended also that the verdict is against the manifest weight of the evidence and that the court therefore erred in failing to grant the motion of defendant for a new trial.

The declaration in its several counts alleged that on June 13, 1928, defendant owned, possessed, used and operated an automobile which he was driving in an easterly and northerly direction along Jackson boulevard near its intersection with Springfield avenue; that at the same time plaintiff was proceeding in a westerly direction along Jackson boulevard on a motorcycle; that defendant so carelessly, negligently and improperly managed and controlled the automobile that by reason thereof the automobile of defendant turned from the eastbound direction to the north on Springfield avenue and collided with and struck against plaintiff and the motorcycle on which he was riding, injuring him. One count alleged that defendant drove his automobile at the time and place in question wilfully, wantonly and recklessly, and another alleged

12-00000

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a very important document, as it sets out the President's policy on the secession of the Southern States. The President states that he will not recognize the secession of any State, and that he will use all the power of the Federal Government to maintain the Union.

RECEIVED BY
THE DIRECTOR

10. *Other* _____

It is noted for review that Plaintiff failed to
introduce the fact of the case on the part of the
defendant's witnesses and that an instruction requested by the
defendant at the time of all the evidence should have been given
for that reason. It is contended also that the verdict is against
the manifest weight of the evidence and that the court therefore
erred in failing to grant the motion of defendant for a new trial.
The defendant in its several counts alleged that on
June 18, 1935, defendant owned, possessed, used and operated an
automobile which he was driving in an easterly and northerly
direction along Jackson Avenue from the intersection of
Springfield Avenue; that at the same time plaintiff was proceeding
in a westerly direction along Jackson Avenue on a northerly;
that defendant at Springfield, Springfield and Springfield
and controlled the automobile that he owned through the said
of defendant turned from the westerly direction in the north on
Springfield Avenue and collided with and struck against plaintiff
and the automobile on which he was riding, injuring him. The count
alleges that defendant drove the automobile at the time and place
in question recklessly, unlawfully and negligently, and against alleged

that defendant drove his automobile to the left of the center of the intersection of Jackson boulevard and Springfield avenue, injuring plaintiff.

The errors assigned and argued require a careful review of the facts. Plaintiff was an electrician employed at the University of Chicago. At the time in question he lived in Forest Park and in going to and from his work rode upon a Henderson motorcycle. He was accustomed to ride motorcycles and, in fact, rode one in England during the war.

He says that on the day in question he was returning to his home by way of the park system and that he came into Jackson boulevard at Hamlin avenue. Jackson boulevard runs east and west, Hamlin avenue north and south. There were stop lights at the intersection of Hamlin avenue and Jackson boulevard, and when he came to the boulevard the traffic lights were against him. It was then about five or five-thirty o'clock in the afternoon. When he got the signal for the traffic to move plaintiff turned west on Jackson boulevard. He says there were two cars ahead of him; that he passed them immediately after he turned to the west, within approximately 50 feet of the corner, and that there was nothing else ahead of him from then on down to Springfield avenue except the cars parked at the north curb. Springfield avenue is another public highway which intersects Jackson boulevard and runs north and south. Unlike Hamlin avenue, there were no traffic lights at Springfield, the next traffic lights west of Hamlin avenue being at Crawford avenue, a north and south street two blocks west of Hamlin.

Plaintiff says that when he passed the two cars he was in the center of the street and then swung over towards the north curb. He thinks that as he traveled westward in the block from Hamlin to Springfield there was no eastbound traffic, but that there

that defendant drove his automobile in the city of the county of the
intersection of Jackson Boulevard and Washington Boulevard, Chicago,
Illinois.

The expert testified and argued regarding a careful review
of the facts. Plaintiff was an automobile engineer at the Uni-
versity of Chicago. At the time in question he lived in Forest
Park and in 1912 he and his wife took upon a two-year motor-
cycle. He was accustomed to ride motorcycles and, in fact, took
one in England during the war.

He says that on the day in question he was returning
to his home by way of the back system and that he came into Jackson
Boulevard at Madison Avenue. Jackson Boulevard runs east and west,
Madison Avenue north and south. There were stop lights at the inter-
section of Madison Avenue and Jackson Boulevard, and when he came to
the intersection the traffic lights were against him. It was then

about five or five-thirty o'clock in the afternoon. When he was the
signal for the traffic to move Plaintiff turned west on Jackson
Boulevard. He says there were two cars ahead of him; that he passed
them immediately after he turned to the west, within approximately
80 feet of the corner, and that there was nothing else ahead of him
then, then on down to Washington Avenue except the cars parked at

the north curb. Washington Avenue is another public highway which
intersects Jackson Boulevard and runs north and south. Madison Ave-
nue, there were no traffic lights at Washington, the next
traffic lights west of Madison Avenue being at Crawford Avenue, a
north and south street two blocks west of Madison.

Plaintiff says that when he passed the two cars he was
in the center of the street and that there were no cars in the street
west. He thinks that as he traveled westward in the block from Mad-
ison to Washington there was no oncoming traffic, and that there

were several cars between Crawford and Springfield going east, one of which was the car of defendant, and it was over the dividing line of the center of the street when plaintiff first noticed it. It was then about a quarter of a block away. Plaintiff says he swung over further towards the north curb, while defendant's automobile continued east; that he crossed into the intersection of Springfield and Jackson, and that when he got to the northwest corner of the intersection defendant turned left intending to go north on Springfield with the result that defendant's automobile and plaintiff's motorcycle collided. Plaintiff says that the automobile ran into him and struck him on the side and left leg; that he was thrown into the street and his motorcycle went up against the curb of the northwest corner of Springfield and Jackson; that defendant stopped his automobile with the left front wheel about in the center of the west cross walk of Springfield. A passing car took plaintiff to the hospital. There is no doubt that the injuries he sustained were of a very serious nature, in fact it is not contended by defendant that the damages are excessive.

Plaintiff bought the motorcycle about a month before the accident from a man in Oak Park whose name he was not able to remember. He says that as he rode in Jackson boulevard he had an unobstructed view toward the west; that he saw the car driven by defendant coming east when it was about a quarter of a block from him and was 150 to 200 feet from the west line of Springfield avenue; that defendant kept coming and plaintiff kept going; that plaintiff was traveling at about 20 miles an hour; that he had a speedometer on the machine but did not look at it. Concerning defendant plaintiff says: "I did not see him swing into Springfield avenue; there was nothing to obstruct my view. I came right on and the left front wheel of his automobile was in the west cross walk of Springfield avenue, two or three feet north of the curb line of Jackson boulevard.

There is no doubt that the information in this case is of a very serious nature, and it is not considered by the Bureau that the same should be made public. The Bureau is of the opinion that the information in this case is of a very serious nature, and it is not considered by the Bureau that the same should be made public. The Bureau is of the opinion that the information in this case is of a very serious nature, and it is not considered by the Bureau that the same should be made public.

*** At the time of the collision he was right on Jackson boulevard. His car stopped directly. He wasn't in Springfield at all; he didn't turn into Springfield."

Mr. Shoop, a police officer for the West Park Board, testified for plaintiff that at the time in question he was walking west on Jackson boulevard about 25 feet east of Springfield avenue on the north side of Jackson; that plaintiff's motorcycle passed him going, as he judged, at from 20 to 25 miles an hour; that there were no automobiles ahead of the motorcycle when it passed him; that the eastbound traffic was rather light, while the westbound traffic was rather heavy; that defendant's automobile, which was going east, came up to make a left turn, and that the automobile and motorcycle collided on the northwest corner at the sidewalk line on Springfield avenue; that the automobile did not get into the pavement of Springfield at all, but that the left corner of it was practically up to the northwest corner of the intersection. He says that when the motorcycle passed him it was, he would judge, about six feet from the curb of Jackson, and that he did not recognize any change in the speed of the motorcycle from the time it passed him up to the time of the collision; that he did not notice any horn, signal, or anything of the sort from the automobile. He further says that he first noticed the automobile about 50 or 75 feet west of the west line of Springfield avenue; that it was somewhat over the center of Jackson boulevard; that the automobile started to make a turn into Springfield but did not get into Springfield; that at the time of the collision the automobile was headed northeast and was just about even with the curbstone line of the west sidewalk of Springfield.

Another police officer testified that at the time in question he was stationed at Hamlin and Jackson regulating traffic; that when the accident occurred he got into the next car going west

"I am sure that you will find it interesting to know that I have been thinking about you very much lately."

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[illegible]

and got down to Springfield avenue where he saw the motorcycle up against the curb; that the motorcycle was lying at the northwest corner of Springfield and Jackson, mostly on Jackson; that the automobile was on the north side of Jackson about seven or eight feet from the motorcycle; that the radiator of the car was headed north, but that no part of the automobile was in the pavement of Springfield.

The evidence for defendant tends to show that he lived in Chicago all his life; that the automobile he was driving at the time in question was a Willys-Knight which he bought new April 25, 1928; that he had used the car every day, and that four times each day he made the turn at the corner of Springfield and Jackson. He says that as he ran the automobile east he intended to turn north into Springfield avenue; that as he approached Springfield there were cars coming from the east, the traffic being heavy at that time; that he waited for a space which he noticed about 75 feet away; that he came up to Springfield avenue and made a short turn into Springfield; that the nearest car coming from the east towards him at that time was about 50 feet away; that there were two cars abreast coming towards him. He testifies that before he turned he put out his left arm horizontally to signify his intention of turning; that the cars going west were some 75 feet east when he turned into Springfield, and that when he got to the north curb of Jackson boulevard he heard a motorcycle; that he looked north and then east and noticed two automobiles side by side and the motorcycle was coming west close to the curb ahead of the automobiles going, as he would judge, about 40 miles an hour; that his attention was attracted by the loud explosions of the motorcycle; that when he saw the motorcycle he shut off the ignition of his car; that he was stopped there three seconds when this motorcycle

came around the car and plaintiff struck the right-hand headlight in the rear with his shoulder and the motorcycle collided with the right-hand fender and damaged the radiator. Defendant says his automobile had come to a full stop at the time of the collision; that the motorcycle ran north into Springfield avenue and made a curve; that his automobile at that time was just in front of the parkway of the sidewalk; that after plaintiff's shoulder struck the headlight of defendant's car plaintiff fell off the motorcycle; that the motorcycle swung around in front of the car and lay about two feet in front of the car and about 15 feet north of the north curb of Jackson boulevard. Defendant says that the first time he saw the motorcycle it was 25 feet east of the building line, which would be about 35 feet from defendant; that the motorcycle was then just one length in front of the automobiles approaching from the east, and that it was over toward the north curb; that he was then looking east on account of the explosions of the motorcycle; that he went across to the north curb of Jackson boulevard before cutting down the ignition; that he turned it off when he heard the motorcycle exploding and thought there might be trouble. He testifies that he had never heard such explosions before; that the motorcycle came west on Jackson while he was still standing, and that plaintiff turned north into Springfield; that plaintiff ran into the front end of the headlight of defendant's car and "kind of side-swiped" the side of the car; that the motorcycle then fell over and plaintiff fell off toward the north; that the headlight of defendant's car was bent in backward, right front headlight crushed, the glass broken out of the front, the radiator leaking and the axle out of alignment.

Two school boys, Leonard Rome and William Hemmons, who were about 14 years of age, testified for defendant that at the time in question they were at the southeast corner of Jackson boule-

came around the car and instantly about the right-hand headlight in the rear with his shoulder and the motorcycle collided with the right-hand fender and damaged the radiator. Defendant says his automobile had come to a full stop at the time of the collision; that the motorcycle ran north into Springfield avenue and made a curve; that his automobile at that time was just in front of the highway of the sidewalk; that after Plaintiff's shoulder struck the headlight of defendant's car Plaintiff fell off the motorcycle; that the motorcycle swung around in front of the car and lay about two feet in front of the car and about 15 feet north of the north curb of Jackson Boulevard. Defendant says that at that time he saw the motorcycle it was 25 feet east of the building line, which would be about 55 feet from defendant; that the motorcycle was then just one length in front of the automobile approaching from the east, and that it was over toward the north curb; that he was then looking east on account of the explosion of the motorcycle; that he went across to the north curb at Jackson Boulevard before coming down the sidewalk; that he turned it off when he heard the motorcycle exploding and thought there might be trouble. He testified that he had never heard such explosions before; that the motorcycle came west on Jackson while he was still standing, and that Plaintiff turned north into Springfield; that Plaintiff ran into the front end of the headlight of defendant's car and "kind of slipped" the side of the car; that the motorcycle then fell over and Plaintiff fell off toward the north; that the headlight of defendant's car was bent in backward, right front headlight cracked, the glass broken out of the front, the radiator leaking and the axle out of alignment.

Two school boys, Leonard Jones and William Hanson, who were about 14 years of age, testified for defendant that at the time in question they were at the southeast corner of Jackson Boulevard

vard and Springfield avenue and were walking north. Leonard says that they stood there waiting for traffic to go by and saw two or three cars in a line going west and saw defendant's car coming from the west when it was about 30 or 40 feet from the west line of Springfield avenue; that when he first saw it it was turning north in Springfield avenue; that plaintiff's motorcycle was about 40 feet from the corner when he first saw it going west on Jackson quite close to the north curb; that defendant's car was not in motion at the time the motorcycle turned into Springfield; that the motorcycle hit the car around the fender and bumper. He thinks the motorcycle was going about 25 or 30 miles an hour. He says that the automobiles were ahead of the motorcycle; that plaintiff was passing them up; that there were some cars alongside of him or passing and some behind him.

William Hemmons says that he noticed automobiles going west about 20 feet east of Springfield avenue; that he noticed the car that turned into Springfield avenue; that it was starting to make the turn when he first saw it; that as it started to make the turn he noticed some cars coming from the east; that he did not notice the motorcycle until the automobile turned into Springfield; that the motorcycle was at the northeast corner when he first noticed it in motion; that it turned north into Springfield avenue; that the auto was north of the north line of Jackson boulevard when it stopped; that the motorcycle continued into Springfield avenue and the two collided. In his opinion the speed of the motorcycle was between 20 and 30 miles an hour.

The automobile mechanic who repaired defendant's automobile testified that the right front fender and the headlight were smashed against the radiator, one axle and the radiator shell were bent and the coil was damaged.

The authorities cited by defendant (and many others

with the Springfield avenue and were walking north. I cannot say
that they stood there waiting for traffic to go by and saw two or
three cars in a line going west and saw defendant's car coming from
the west when it was about 30 or 40 feet from the west line of
Springfield avenue; that when he first saw it it was turning north
in Springfield avenue; that defendant's car was west of
left from the corner when he first saw it going west on Jackson
high class in the north lane; that defendant's car was not in
line at the time the accident occurred with Springfield avenue
motorcycle hit the car around the fender and bumper. He thinks the
motorcycle was going about 25 or 30 miles an hour. He says that
the automobiles were about of the motorcycle; that himself was
passing them up; that there were some cars alongside of him at
passing and some behind him.

William Gorman says that he noticed automobiles going
west about 30 feet east of Springfield avenue; that he noticed the
car that turned into Springfield avenue; that it was starting to
make the turn when he first saw it; that as it started to make the
turn he noticed some cars coming from the east; that he did not
notice the motorcycle until the automobile passed him; that
that the motorcycle was at the northeast corner when he first
noticed it is correct; that it turned south from Springfield avenue
that the auto was north of the north line of Jackson boulevard when
it stopped; that the motorcycle continued west Springfield avenue
and the two collided. In his opinion the speed of the motorcycle
was between 20 and 30 miles an hour.

The automobile was turned defendant's name.
mobile testified that the light turn fender and the headlights were
damaged and the motorcycle was not and the defendant's name
boy and the girl his daughter.
The motorcycle hit the automobile first and came

which might have been cited) show the rule of law in this State to be that in cases of this kind the burden of proof is upon the plaintiff to establish affirmatively the proposition that at the time and place in question he was free from contributory negligence and in the exercise of due care. (Calumet Steel Co. v. Martin, 115 Ill. 358; Stack v. East St. Louis Ry. Co., 245 Ill. 308; Sauer v. Hinde, 183 Ill. App. 413.) The allegation of due care is a material averment of the declaration which the plaintiff must prove in order to establish a right of recovery. Under ordinary circumstances the question of whether the plaintiff is or is not guilty of contributory negligence is a question for the jury, but when there is no evidence from which a jury can find reasonably that the plaintiff was in the exercise of due care, plaintiff as a matter of law is not entitled to recover. When a manifest preponderance of the evidence tends to show that the plaintiff is guilty of contributory negligence, it is the duty of the trial court to set aside a verdict for the plaintiff, and the failure to allow a motion by defendant for a new trial under such circumstances is reversible error. Donelson v. East St. Louis Ry. Co., 235 Ill. 628.

It is urged in behalf of defendant that the verdict of the jury conflicts with the clear weight of the evidence, and we are of the opinion, after a consideration of it, that plaintiff did not prove - which it was necessary for him to do - that he was in the exercise of due care just before and at the time of the accident in which he was injured. We reach this conclusion, assuming his own testimony gives a true and correct narration of the circumstances under which he received his injuries. He says that he could see the automobile of defendant as it approached from the west. His view was unobstructed, but he does not say that he did anything which would in any way tend to prevent the collision. It was just as much his duty as it was the duty of defendant to be

which might have been shown) and the law in this State is
that in cases of this kind the burden of proof is upon the
defendant to establish affirmatively the proposition that at the
time and place in question he was free from contributory negligence
and in the absence of the same. (Donelson v. Long, 111. 528; 529; 530; 531; 532; 533; 534; 535; 536; 537; 538; 539; 540; 541; 542; 543; 544; 545; 546; 547; 548; 549; 550; 551; 552; 553; 554; 555; 556; 557; 558; 559; 560; 561; 562; 563; 564; 565; 566; 567; 568; 569; 570; 571; 572; 573; 574; 575; 576; 577; 578; 579; 580; 581; 582; 583; 584; 585; 586; 587; 588; 589; 590; 591; 592; 593; 594; 595; 596; 597; 598; 599; 600; 601; 602; 603; 604; 605; 606; 607; 608; 609; 610; 611; 612; 613; 614; 615; 616; 617; 618; 619; 620; 621; 622; 623; 624; 625; 626; 627; 628; 629; 630; 631; 632; 633; 634; 635; 636; 637; 638; 639; 640; 641; 642; 643; 644; 645; 646; 647; 648; 649; 650; 651; 652; 653; 654; 655; 656; 657; 658; 659; 660; 661; 662; 663; 664; 665; 666; 667; 668; 669; 670; 671; 672; 673; 674; 675; 676; 677; 678; 679; 680; 681; 682; 683; 684; 685; 686; 687; 688; 689; 690; 691; 692; 693; 694; 695; 696; 697; 698; 699; 700; 701; 702; 703; 704; 705; 706; 707; 708; 709; 710; 711; 712; 713; 714; 715; 716; 717; 718; 719; 720; 721; 722; 723; 724; 725; 726; 727; 728; 729; 730; 731; 732; 733; 734; 735; 736; 737; 738; 739; 740; 741; 742; 743; 744; 745; 746; 747; 748; 749; 750; 751; 752; 753; 754; 755; 756; 757; 758; 759; 760; 761; 762; 763; 764; 765; 766; 767; 768; 769; 770; 771; 772; 773; 774; 775; 776; 777; 778; 779; 780; 781; 782; 783; 784; 785; 786; 787; 788; 789; 790; 791; 792; 793; 794; 795; 796; 797; 798; 799; 800; 801; 802; 803; 804; 805; 806; 807; 808; 809; 810; 811; 812; 813; 814; 815; 816; 817; 818; 819; 820; 821; 822; 823; 824; 825; 826; 827; 828; 829; 830; 831; 832; 833; 834; 835; 836; 837; 838; 839; 840; 841; 842; 843; 844; 845; 846; 847; 848; 849; 850; 851; 852; 853; 854; 855; 856; 857; 858; 859; 860; 861; 862; 863; 864; 865; 866; 867; 868; 869; 870; 871; 872; 873; 874; 875; 876; 877; 878; 879; 880; 881; 882; 883; 884; 885; 886; 887; 888; 889; 890; 891; 892; 893; 894; 895; 896; 897; 898; 899; 900; 901; 902; 903; 904; 905; 906; 907; 908; 909; 910; 911; 912; 913; 914; 915; 916; 917; 918; 919; 920; 921; 922; 923; 924; 925; 926; 927; 928; 929; 930; 931; 932; 933; 934; 935; 936; 937; 938; 939; 940; 941; 942; 943; 944; 945; 946; 947; 948; 949; 950; 951; 952; 953; 954; 955; 956; 957; 958; 959; 960; 961; 962; 963; 964; 965; 966; 967; 968; 969; 970; 971; 972; 973; 974; 975; 976; 977; 978; 979; 980; 981; 982; 983; 984; 985; 986; 987; 988; 989; 990; 991; 992; 993; 994; 995; 996; 997; 998; 999; 1000)

on guard and to use reasonable diligence to the end that the collision might be prevented. The operation of a motorcycle upon the streets of Chicago is not without its perils not only to the operator but to others using the streets. It is the duty of one riding such a vehicle to use due and reasonable care in view of the nature of the vehicle and all the circumstances under which he is riding. If plaintiff's evidence is true he either saw or could have seen defendant as defendant made the turn into Springfield avenue. He says he did not see defendant. If his evidence to the effect that he had an unobstructed view is true, he ought to have seen him and would have seen him if he had looked. Plaintiff says that he was going 30 miles an hour, but the damages to defendant's automobile indicate a much greater speed, and plaintiff does not say that he lessened the speed of the motorcycle as he approached the crossing. The force with which the motorcycle struck the automobile must have in a large measure resulted from the speed at which plaintiff was riding, for all the testimony seems to indicate that defendant's automobile either was moving slowly or had come practically to a standstill.

We think a clear preponderance of the evidence as it stands in this record indicates that plaintiff was in fact guilty of contributory negligence tending to cause the injuries he received and that the trial court should have granted a new trial for that reason.

For the reason that the verdict is clearly and manifestly against the weight of the evidence so far as the care on the part of plaintiff is concerned, the judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P. J., dissents:

McSurely, J., concurs.

and that the trial court should have granted a new trial for that
of negligence and injury resulting from the alleged negligence
of the driver of the motor vehicle. The trial court was in error in
granting the judgment and awarding costs to the defendant. The
verdict of the jury is affirmed. The case is remanded to the
trial court for a new trial. The costs of the appeal are
awarded to the plaintiff. The case is remanded to the trial
court for a new trial. The costs of the appeal are awarded to
the plaintiff. The case is remanded to the trial court for a
new trial. The costs of the appeal are awarded to the plaintiff.

35399

MINNIE C. BUTTS,
Appellant,

vs.

G. A. ERICKSON and GERTRUDE
F. ERICKSON,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 620

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Minnie C. Butts, plaintiff, from an order of the Municipal court entered July 31, 1931, setting aside and vacating the default and judgment theretofore entered by the court June 8, 1931. By agreement of the parties the cause has been consolidated for hearing with causes Nos. 35400 and 35401 now pending in this court, wherein the records require adjudication of the same questions between these parties.

These litigants are not strangers in this court. On March 2, 1931, in cause number 34696, and on March 23, 1931, in causes numbers 34697 and 34698, opinions in which are not yet reported, this court affirmed judgments in forcible entry and detainer in favor of this plaintiff and against these defendants.

This particular suit was begun April 18, 1931, and plaintiff in her statement of claim discloses an action against defendants upon the bond given in appeal and claims damages in the sum of \$7710.35 and interest at 5% on that amount from March 17, 1931, to date of judgment for unreasonable and vexatious delay. The statement in each case was verified by affidavit.

The record further shows that May 15, 1931, defendants filed an affidavit of merits and that June 8, 1931, this affidavit of merits was stricken upon plaintiff's motion, the evidence heard by the court with a finding in each case of the amount due from defendants to plaintiff, and upon these findings the court entered

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023 .A.1432

THESE SERVOUS DO NOT BELIEVE THAT CONSPIRACY THEORY IS A FACT

This is an appeal by Albert C. Baker, Plaintiff,
from an order of the Municipal Court entered July 21, 1931, set-
ting aside and annulling the default and judgment entered on
June 11, 1931, by agreement of the parties the
same has been reconsidered for reversal this court has, after
and there was nothing in the court, should the court reverse
the decision of the court because the court is not

This particular suit was begun April 13, 1934, and
detained in favor of said plaintiff and against these defendants.
recovered, who were allowed judgments in their favor and
is known as cases 2487 and 2488, wherein in which the suit was
on March 2, 1934, in which said suit, and on March 11, 1934,
these judgments are now standing in said court.

17. 1931, to have an instrument for unimpeachable and veridical
evidence. The statement in such case was verified by affidavit.

of the fact that the Government is not a party to the dispute and that the Government is not a party to the dispute and that the Government is not a party to the dispute.

judgment and ordered that execution issue thereafter.

June 12, 1931, defendants made a motion that the default and judgment be vacated and set aside. This motion was continued until June 26, 1931, when it was overruled and denied. July 15, 1931, defendants made a motion to vacate and set aside the order of June 26, 1931. July 31, 1931, that motion and defendants' motion to vacate and set aside the default and judgment of June 8, 1931, were sustained and an order was entered granting defendants leave to file an amended affidavit of merits within ten days. From this order of July 31st this appeal is prosecuted.

The bill of exceptions shows that July 15, 1931, defendants filed a petition in support of the motion made on that date and that this petition was verified by C. A. Erickson. The petition recites that judgment by default was entered June 8, 1931, upon a suit on an appeal bond executed by defendants in the sum of \$15,000 conditioned upon the successful prosecution of the appeal from the judgment obtained by plaintiff, Minnie C. Butts, in a forcible entry suit on August 4, 1931; that the bond provided that if C. A. Erickson should effectively prosecute an appeal and pay all rent then due or that might become due before final determination of the suit and also all damages and loss sustained by plaintiff, with costs accrued or which might accrue in case judgment was affirmed or appeal dismissed, the obligation should be void, otherwise to remain in full force and effect. The petition further states that the total rent due under the terms of the written lease, upon which judgment for possession was entered, was \$7650.

The petition avers that judgments in the three cases for a total sum of \$20,663.39 were entered in favor of plaintiff for accruing rent; sets up the numbers and titles of the cases with the amounts of the judgments entered in favor of plaintiff,

and avers that said judgments are excessive and exorbitant and more than plaintiff's claim. It is further averred that on June 12, 1931, C. A. Erickson appeared in court with his attorneys on a motion to vacate the default judgments; that they understood the court to say that the motion was continued to June 30, 1931; that they appeared in Judge Melander's court room on June 20th and were informed by the clerk that the motion had been overruled on June 19, 1931; that C. A. Erickson did not have his day in court. The petition prays that the judgments entered by default may be vacated and set aside, leave given to file affidavits of merits and the case set for trial on the merits.

Defendants have made a motion in this court to dismiss these appeals upon the theory that the order of July 31, 1931, was interlocutory and not final and appealable and that motion has been reserved to the hearing. In support of this motion defendants cite J. Evenson & Sons v. Adelson, 232 Ill. App. 461; Walker v. Oliver, 63 Ill. 199; City of Park Ridge v. Murphy, 253 Ill. 365; Cramer v. Ill. Comm'l Men's Assoc., 260 Ill. 516, and Bailey v. Conrad, 271 Ill. 294.

In the case of J. Evenson & Sons v. Adelson, the order appealed from was entered upon a motion made within thirty days after the rendition of the judgment which it was sought to vacate. That case is therefore not in point. Walker v. Oliver, and City of Park Ridge v. Murphy did not arise under the Municipal court act and are therefore not applicable to this case, although Cramer v. Ill. Comm'l Men's Assoc. distinguishes those two cases and lays down rules of law inconsistent with defendants' contention here. Bailey v. Conrad was an appeal from a decree in chancery where a judgment was vacated within the term, and therefore has no application.

On the contrary, in Central Bond Co. v. Reaser, 323

and every time that I thought of the sensitive and thoughtful man
 more than his ability to do. It is a matter of fact that on June
 12, 1931, E. A. Erickson appeared in court with his attorney on a
 motion to vacate the default judgment; that they understood the
 court to say that the motion was continued to June 30, 1931; that
 they appeared in Judge Kalmanson's court room on June 30th and were
 informed by the clerk that the motion had been overruled on June
 19, 1931; that E. A. Erickson did not have his say in court. The
 petition says that the judgment entered by default was in violation
 and set aside. I have given to the attorney of record and the
 case set for trial on the merits.

Defendants have made a motion in this court to dismiss
 these appeals upon the theory that the order of July 25, 1931, was
 inadvisable and not final and appealable and that motion has been
 referred to the hearing. In support of this motion defendants cite
1. Lawrence v. Lee v. Mearns, 282 Ill. App. 401; Wright v. Wright,
27 Ill. 1st; City of East Moline v. Murphy, 282 Ill. 202; Clayton v.
Ill. Central R.R. Co., 282 Ill. 212, and Wright v. Central, 281
 Ill. 201.

In the case of Lawrence v. Lee v. Mearns, the
 order appealed from was entered upon a motion made by the
 defendants after the expiration of the judgment when it was entered by
 default. That case is distinguishable and is not. Wright v. Wright,
 and City of East Moline v. Murphy are not cases where the judgment
 was set aside and the judgment was set aside. In this case, although
Wright v. Ill. Central R.R. Co. is cited, it is distinguished from the case
 and says from facts of the case that it is distinguishable from the case.
 In this case, Wright v. Central was an order from a justice in
 default where a judgment was rendered against the defendant and where
 there was no objection.

In the case of Lawrence v. Lee v. Mearns, the

Ill., 96, it was specifically held by the Supreme court that an order of the court on a motion to vacate a judgment under section 89 of the Practice act, or under section 21 of the Municipal Court act, after the time allowed by law for modifying or vacating the same, was a final and appealable order. This court has consistently followed that case in Imbrie v. Bear, 230 Ill. App. 155; Walley v. Klein, 257 Ill. App. 171, and many other cases which might be cited.

Moreover, plaintiff contends that since the judgment was entered June 8, 1931, and the motion to vacate was made on June 12th thereafter, which was continued from time to time until on or about June 26, 1931, when it was overruled, the said order of June 26th was final, and the Municipal court of Chicago was without jurisdiction on July 31, 1931, to enter any order vacating the judgment of June 8th. It has been so held in Orient v. Channell, 209 Ill. App. 438; Collins v. Drab, 209 Ill. App. 447; Greenstone v. Oliver, 233 Ill. App. 184, upon similar facts. In the last named case it was specifically held, construing section 21 of the Municipal Court act, that the provision thereof allowing thirty days after entry of the judgment for a motion to vacate, set aside or modify it did not necessarily mean thirty days after the overruling of a motion to vacate and that where under said section a motion to vacate was entered and decided, the judgment was thereafter invulnerable. The reason for that rule was based upon the decision of the Supreme court in People v. Walls, 255 Ill. 450, where it was held that upon the denial of a motion to set aside a judgment theretofore entered, the judgment under section 21 of the Municipal Court act became final by its express provisions and could not thereafter be set aside except upon appeal or writ of error, or by a bill in equity or a petition containing all the essential facts to sustain such a bill. The court said

in substance that while section 21 allowed thirty days after the entry of judgment for a motion to vacate, that did not necessarily mean thirty days after the motion to vacate was overruled; that such construction would mean that successive motions might be made which would render final judgments impossible. The opinion cites, in addition to the authorities already named, Hier v. Kaufman, 134 Ill. 215; Sage Hotel Co. v. Rantoes, 185 Ill. App. 393.

It is not urged, and cannot be successfully contended, that the petition filed in support of defendants' motion would be sufficient as the equivalent of a motion under section 89 of the Practice act or a bill in equity as provided by section 21.

For the reasons indicated the motion to dismiss will be denied and the order appealed from will be reversed with directions to the trial court to expunge the same from the record.

REVERSED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

35400

MINNIE C. BUTTS,
Appellant,

vs.

C. A. ERICKSON and GERTRUDE
F. ERICKSON,
Appellees.

28 7
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 621'

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause has been consolidated for hearing in this court with causes Nos. 35399 and 35401 between the same parties, in which an opinion is this day filed. The questions arising upon the records in these causes are identical, and for the reasons stated in the opinion filed in No. 35399, here, as there, the motion to dismiss will be denied and the order of the trial court will be reversed with directions to expunge the same from the record.

REVERSED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

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35430

JOSEPH J. BURITA,
Appellant,)

vs.)

CHECKER TAXI COMPANY,
Appellee.)

30 7
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

264 I.A. 621³

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment entered on the verdict of a jury in favor of defendant in an action on the case for personal injuries after a motion for a new trial by plaintiff had been overruled. It is urged for reversal that the verdict is against the weight of the evidence and that the court erred in the number of instructions given which directed a verdict in favor of defendant, as well as in the subject matter of the instructions given at defendant's request.

On January 23, 1930, at the intersection of Montrose avenue and Dover street in the city of Chicago, plaintiff was struck and seriously injured by a cab of defendant which was driven by one of its servants. The declaration in its several counts alleged that plaintiff was in the exercise of due care and that the servant of defendant was negligent in driving recklessly and at an excessive and unlawful rate of speed, in failing to reduce the speed at which he was driving and in swerving and changing the line of travel after plaintiff had cleared the path on which defendant's servant was driving. Defendant filed a plea of the general issue with a special plea denying ownership and operation.

Montrose avenue is a public highway extending east and west on the north side of Chicago. It is intersected by another public street, Dover, which runs north and south. The accident in which plaintiff was injured occurred on January 23, 1930, at or near the intersection of these two streets and between the hours of one

APPROVED AND FORWARDED:
SPECIAL AGENT IN CHARGE
FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE

RECEIVED FROM CIRCUIT COURT

OF COOK COUNTY.

SEC 41 A. 821

IN RE: JAMES EARL RAY, ALIAS, ET AL.

This is an appeal by plaintiff from a judgment entered on the verdict of a jury in favor of defendant in an action on the case for personal injuries after a motor vehicle accident by plaintiff and defendant. It is urged for reversal that the verdict is against the weight of the evidence and that the court erred in the manner of instructing the jury. The court erred in the manner of instructing the jury as well as in the subject matter of the instructions given to the jury.

On January 22, 1960, at the intersection of Congress Avenue and 10th Street in the city of Chicago, plaintiff was struck and seriously injured by a car of defendant which was driven by one of its servants. The defendant in its general contract alleged that plaintiff was in the company of one car and that the car was of defendant was negligent in driving recklessly and at an excessive and unlawful rate of speed, in failing to reduce the speed at which he was driving and in swerving and changing the line of travel after plaintiff had crossed the path on which defendant's servant was driving. Defendant filed a plea of the general issue with a special plea denying ownership and operation.

Defendant's plea is a denial of ownership and operation west on the north side of Chicago. It is introduced by another public street, 10th, which runs north and south. The accident in which plaintiff was injured occurred on January 22, 1960, at or near the intersection of these two streets and between the hours of two

and two o'clock in the afternoon. A double line of street car tracks is laid in Montrose avenue. On the north track westbound cars moved and on the south track, eastbound cars. The distance between the north rail of the westbound track and the north curb of Montrose avenue is about 12 or 13 feet. Montrose avenue is 42 feet 3 inches wide from curb to curb. Dover street at this place is 32 feet wide from curb to curb. There is a parkway on each side of the street and the sidewalks on Dover street are set back ten feet from the curb. These sidewalks are about five feet wide. The eastbound cars on Montrose avenue stopped on the west side of Dover street for the purpose of discharging passengers.

At the time in question plaintiff, a man about 65 years of age, alighted from the front platform on the eastbound Montrose avenue car at Dover street, the car stopping on the west side of that street. It is the contention of plaintiff (and he offered some evidence tending to show) that he then started to cross Montrose avenue in a northerly direction on the west side of Dover street; that he crossed the eastbound and the westbound street car tracks and walked approximately nine feet north on the north rail of the westbound track towards the north curb of Montrose avenue and within a foot or two of it, when he was struck by defendant's cab then westbound on Montrose avenue. On the contrary the evidence for defendant tended to show that after plaintiff alighted from the car he passed behind it and started to cross Montrose avenue at a point ten to twenty feet west of the west side of Dover street and that as defendant's taxicab approached from the east plaintiff ran or jumped or leaped in front of the taxicab and received his injury in that manner.

Plaintiff contends with a great deal of earnestness that the verdict of the jury is against the clear weight of the evidence and that it is the duty of this court to reverse for that reason. Since for other errors the cause must be again submitted to another

and two o'clock in the afternoon. A double line of street car tracks is laid in Montrose avenue. On the north track westbound cars moved out on the north track, eastbound cars. The distance between the north rail of the westbound track and the north curb of Montrose avenue is about 12 or 13 feet. Montrose avenue is 42 feet 3 inches wide from curb to curb. Dover street at this place is 32 feet wide from curb to curb. There is a pathway on each side of the street and the sidewalks on Dover street are not back less than 10 feet from the curb. These sidewalks are about five feet wide. The eastbound cars on Montrose avenue stopped on the west side of Dover street for the purpose of discharging passengers.

At the time in question Plaintiff, a man about 35 years of age, alighted from the front platform on the eastbound Montrose avenue car at Dover street, the car stopping on the west side of that street. It is the contention of Plaintiff (and he offered some evidence tending to show) that he then started to cross Montrose avenue in a northerly direction on the west side of Dover street; that he crossed the eastbound and the westbound street car tracks and walked approximately nine feet north on the north rail of the westbound track towards the north curb of Montrose avenue and within a foot or two of it, when he was struck by defendant's car from westbound Montrose avenue. In the contrary the evidence for defendant tends to show that after Plaintiff alighted from the car he passed behind it and started to cross Montrose avenue at a point ten to twenty feet west of the west side of Dover street and that he defendant's car struck him from the rear and carried him to the front of the car and received his injury in that manner.

Plaintiff contends with a great deal of enthusiasm that the location of the car is shown by the street light at the intersection and that it is the duty of this court to reverse for that reason. First for other errors the court must be again submitted to another

jury, we shall not undertake to discuss the evidence further than to say that it was sufficient, in our opinion, to make an issue for the jury, and that plaintiff was therefore entitled to have the cause submitted to the jury under instructions which accurately stated the law applicable to the facts of the case as brought out upon the trial.

At the request of defendant the court gave 24 instructions to the jury. Thirteen of them concluded with the phrases, "your verdict should be not guilty," "you should find the defendant not guilty," or with words having a similar meaning. The practice of giving such a large number of instructions to the jury with conclusions of this kind has been often condemned by this court as tending to create the impression in the minds of the jury that the court upon the issue of fact is favorable to the defendant. In Nelson v. Chicago City Ry. Co., 163 Ill. App. 98, we said that such a large number of instructions "were well calculated to impress the jury with the thought that the court was against the plaintiff on the question of fact, and that they might readily be misled to believe that in the opinion of the court they should find for the defendant." In the same opinion we said that such practice was as effective, if not more so, as printing the words in large type - a practice which was condemned in Elwood v. Chicago City Ry., 90 Ill. App. 397. In Wood v. Ill. Cent. R. R. Co., 185 Ill. App. 180, where of the 15 instructions offered by defendant and given, six concluded with the statement that a verdict of not guilty should be returned, we said that the law favorable to defendant was unduly emphasized by the court and that the same constituted error prejudicial to plaintiff. These views were reiterated by this court in Cohen v. Weinstein, 231 Ill. App. 84, and Daubach v. Drake Motel Co., 243 Ill. App. 298. To the same effect is Williams v. Stearns, 256 Ill. App. 425.

Defendant suggests that the law on this subject as stated in the opinions of the Appellate court is contrary to the rule of the Supreme court as stated in Carson, P., S. & Co. v. Chicago Ry. Co., 309 Ill. 346. In that case the opinion discloses that five instructions were given stating the rules of law applicable to the exercise of ordinary care by plaintiff for his own safety. Each instruction told the jury that plaintiff could not recover if plaintiff failed to exercise such care. It was objected that there was needless repetition bringing this question too prominently before the jury, but the opinion of the court states that it was one of the material issues in the case and that while needless repetition might give undue prominence to some matters to which the instructions related, these instructions presented different aspects of the question; that the elaboration of the rule in different instructions did not add anything material to the defense but as there was nothing incorrect in them they were not ground for reversal.

We do not regard that opinion as inconsistent with the rules as laid down by this court. It has never been held by this court that the practice would necessarily constitute reversible error in every case, but the sum and substance of our opinion is that the practice is prejudicial and that it may constitute reversible error.

Plaintiff further contends that the court erred in giving defendant's instruction number 4, which is as follows:

"The court instructs you that if you believe from the evidence that before the plaintiff started to walk or run across the pathway of defendant's automobile, he saw the defendant's car coming toward him, and that he knew that he could not walk or run upon or cross the street without being struck by the defendant's car, and so knowing, without using due care for his own safety, he deliberately walked or ran upon the said street in front of the said defendant's automobile, then as a matter of law he cannot recover in this case."

The court is of the opinion that the law on this subject as
 stated in the opinion of the majority seems in conformity to the
 rule of the Supreme Court as stated in United States v. ...
 1908, 201 U.S. 545. In that case the opinion expressed
 that five instructions were given stating the rule of law appli-
 cable to the exercise of ordinary care by plaintiff for his own
 safety. Such instruction tells one that plaintiff could not
 recover if plaintiff failed to exercise such care. It was objected
 that these five instructions were in substance the same. It was
 held before the jury, but the opinion of the court states that
 it was one of the material issues in the case and that while each
 instruction might give undue prominence to some matter as
 which the instructions related, these instructions presented dif-
 ferent aspects of the question; that the repetition of the rule
 in different instructions did not add anything material to the in-
 structions as they were not repeated in them they were not
 repeated in substance.
 We do not regard that opinion as inconsistent with
 the rule as laid down in this case. It has never been held by
 this court that the practice which necessarily constitutes error
 in every case, but the rule and substance of our opinion
 is that the practice is prohibited and that it may constitute
 error in every case.
 The court is of the opinion that if you believe from the evi-
 dence that the defendant is liable to the plaintiff in this case
 the judgment should be for the plaintiff. The defendant's
 liability is established by the evidence. The plaintiff's
 damages are also established by the evidence. The only
 question is whether the defendant is liable to the plaintiff
 in this case. The court is of the opinion that the defendant
 is liable to the plaintiff in this case. The judgment
 should be for the plaintiff.

Plaintiff complains that there is no evidence in the record tending to show that when plaintiff started to cross the street in front of defendant's car he knew that he could not cross without being struck, and that there is not a scintilla of evidence tending to show that plaintiff, knowing that he would be struck, deliberately walked or ran in the street in front of defendant's automobile. Whether plaintiff started to walk or run across the pathway of defendant's automobile was one of the issues of fact presented by the evidence of the case for the consideration of the jury, and it is elementary that an instruction should not assume the existence of any such contested fact. We think this instruction is erroneous under the rules laid down in M. S. & N. I. Ry. Co. v. Sheldon, 66 Ill. 424; I. C. R. R. Co. v. Johnson, 221 Ill. 43, and Woods v. C. B. & Q. Ry. Co., 306 Ill. 217.

Defendant contends that this instruction is proper on the authority of Chicago Union Traction Co. v. Jacobson, 217 Ill. 404, and Arnold v. Dodson, 272 Ill. 377. In Arnold v. Dodson, however, there was not, as here, any assumption of any contested issue of fact in the instruction given, and the Jacobson case is in our opinion clearly distinguishable upon the facts.

Plaintiff also complains of instruction No. 5 given at defendant's request, which is as follows:

"The court instructs the jury that if they find from the evidence that the defendant's chauffeur was operating the defendant's automobile with ordinary care, and as soon as he saw or by the exercise of ordinary care should have seen the plaintiff start to walk or run across the street or in the way of the defendant's car so that the plaintiff was in a position of danger, with reasonable diligence did what he could in the exercise of ordinary care to avoid injuring the plaintiff, then the jury are instructed to find for the defendant."

It is contended in behalf of plaintiff that the giving of this instruction was error for the reason that where an instruction undertakes to state the facts necessary to be proved to entitle a party to recover, it must contain all of the material facts, and

that where an instruction directs a verdict, a failure to include all such facts is fatal and cannot be cured by other instructions. Plaintiff cites a number of cases so holding, of which it will be sufficient to name Brewster v. Rockford Public Service Co., 257 Ill. App. 182, and National Importing Co. v. Baer & Co., 324 Ill. 346. It is complained that the instruction is defective because it fails to advise the jury that the care required by defendant must be at and just prior to the time of the accident in question; that this instruction eliminated from the consideration of the jury the whole subject of negligence as it pertained to the driving of defendant's cab at and just prior to the accident, and further that the instruction is defective in that it makes the criterion of defendant's negligence, if any, what the chauffeur did or could do in the exercise of ordinary care. It is said (and correctly we think) that the criterion is not what the chauffeur did in the exercise of ordinary care, but what a reasonably prudent man could or would do under similar circumstances to avoid injury to plaintiff. A similar instruction was condemned by this court in Cohen v. Weinstein, 231 Ill. App. 84; and see Novitsky v. Knickerbocker Ice Co., 276 Ill. 102. We hold this instruction to be erroneous.

Plaintiff also complains of defendant's given instruction No. 8, which is as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff stood in a position of safety on Montrose avenue, and while in such position saw the taxicab in question approaching and then negligently walked or ran across Montrose avenue, if you so believe from the evidence, and by reason of such conduct on the part of the plaintiff he was injured, then you are instructed that the plaintiff cannot recover, and you should find the defendant not guilty."

The complaint, in addition to other criticisms, is that this instruction failed to inform the jury that the contributory negligence, if any, of plaintiff which would bar recovery, was to be such as would be the proximate cause of the injury. If plaintiff

was guilty of negligence such guilt would not prevent recovery unless that negligence was the proximate cause of the injuries for which he sues, and instructions which eliminated this material fact have often been held by this and the Supreme court to be erroneous. (Consolidated Coal Co. v. McGinnis, 181 Ill. 9; Miller v. Birch, 254 Ill. App. 387; Williams v. Stearns, 256 Ill. App. 425). We think the giving of this instruction was error.

Complaint is also made of defendant's instruction No. 12, by which the jury were told:

"You are instructed that the plaintiff is required by law to establish his case by a preponderance of the evidence before he can recover. If the plaintiff in this case has not so established his case, or if the said evidence is evenly balanced, or if you are unable to say on which side is the preponderance, then in either of these cases, the verdict should be not guilty."

This instruction was held erroneous in Hurzon v. Schmitz, 262 Ill. App. 337.

Complaint is also made of the giving of defendant's instruction No. 16, which states:

"The court instructs the jury that if at the moment the driver for the defendant, Checker Taxi Company, saw that the plaintiff was in a position of danger, and if at said moment he did all that a prudent and cautious man could do under the said circumstances to avoid striking the plaintiff, and if you further believe that the driver for the defendant, Checker Taxi Company, was operating his automobile in a reasonable, prudent and cautious manner and with such degree of care as required and stated otherwise in these instructions, you are to find the defendant, Checker Taxi Company, not guilty, even though the driver of said car, by turning in any direction might have escaped injuring the plaintiff."

It is contended that this instruction is erroneous in that it makes the criterion of negligence the action of defendant's chauffeur when he saw plaintiff in a position of danger. That is not a proper criterion. On the contrary, the criterion is whether the driver saw the danger of plaintiff or in the exercise of care he should or would have seen that plaintiff was in a position of danger. It is also said that the instruction is subject to criticism in that it assumes that plaintiff was in a position of danger, which

was guilty of negligence with which would not prevent recovery and
less that negligence was the proximate cause of the injuries for
which he sued, and defendant's motion should be denied.

That have often been held by this and the Supreme Court to be ex-
cessive. (Boyd v. United States, 111 U.S. 436; Miller v. United States,
157 U.S. 185; United States v. Williams, 194 U.S. 447.)

We think the giving of this instruction was error.

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1. The first of these is the fact that the Government has been unable to secure the necessary funds to carry out its policy of maintaining the value of the pound at its pre-war level. This has been due to a combination of factors, including the fact that the Government has been unable to secure the necessary foreign exchange to finance its policy.

It is contended that this distinction is erroneous in that it makes the criterion of negligence the action of defendant's counsel. When an act plainly is a violation of duty, there is not a proper criterion. On the contrary, the criterion is whether the act was negligent or not. The question of negligence is not a question of duty.

was one of the issues of fact in the case. The last part of the instruction we regard as particularly vicious as it takes from the jury the very issue which they were called upon to decide.

Objections are made to other instructions which it will be unnecessary to consider. The errors already pointed out compel a reversal.

For the reasons indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

and was at the time of the trial in the city. The defendant is not
 interested in the case as a party to the trial. He is not a party
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35373

HENRY C. FERGUSON,
Appellee.

vs.

CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

31 7
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

264 I.A. 621⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the City of Chicago from a judgment in the sum of \$1200 entered upon the verdict of a jury after motions for a new trial and in arrest had been overruled.

The suit of plaintiff was in case for alleged negligence of the City in permitting to remain out of repair a part of a public street known as Ingleside avenue at or near its intersection with East Fifty-fifth street in the City of Chicago. The declaration averred that the City, notwithstanding it had opportunity to repair, permitted a certain hole to be and remain in the street,, and that while plaintiff with due care was passing over the street at that place, he fell into the hole, receiving the injuries for which he sues. At the close of plaintiff's evidence defendant made a motion for an instructed verdict, and this motion was renewed at the close of all the evidence and denied.

It is here urged for reversal that the court erred in denying the instruction requested, and further that the damages are excessive.

The accident occurred March 31, 1929, about nine o'clock p. m., when (the testimony for plaintiff tends to show) plaintiff was on his way home from a drugstore located at the southeast corner of Fifty-fifth street and Ingleside avenue. Plaintiff says that he crossed from the east to the west side of Ingleside avenue; that there was a terrific downpour of rain; that

STATE OF ILLINOIS

IN SENATE

1881 A.D.

REPORT OF THE

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE

This report is by the City of Chicago from a judge
ment in the sum of \$1000 entered upon the verdict of a jury after
motions for a new trial and in arrest had been overruled.

The suit of plaintiff was in case for alleged negli-
gence of the City in permitting to remain out of repair a part of
a public street known as Ingleside Avenue at or near its intersec-
tion with East Fifty-Fifth Street in the City of Chicago. The

declaration averred that the City, notwithstanding it had opportunity
to repair, permitted a certain hole to be and remain in the street,
and that while plaintiff with his wife was passing over the street

at that place, he fell into the hole, receiving the injuries for
which he sues. At the close of plaintiff's evidence defendant
made a motion for an instructed verdict, and this motion was re-
newed at the close of all the evidence and denied.

It is here urged for reversal that the court erred in
denying the instruction requested, and further that the damages
were excessive.

The evidence presented to the court was as follows:
At 9 o'clock p. m., when (the testimony for plaintiff tends to show)
plaintiff was on his way home from a temporary residence at the
residence of his wife and daughter, he was passing over the
plaintiff says that he crossed from the curb to the west side of

he started to run and out across the corner when he stepped into the hole, which was near the sidewalk, and fell.

Defendant says that there is no evidence tending to show that plaintiff was in the exercise of care for his own safety, and a number of cases, such as Beidler v. Branchaw, 200 Ill. 425; Wilson v. Ill. Cent. R. R. Co., 210 Ill. 603; Devine v. Pfeelzer, 277 Ill. 255, are cited to this point. Defendant also contends, citing Fuller v. Peoria & Pekin Union Ry. Co., 164 Ill. App. 385; Johnson v. Gustafson, 233 Ill. App. 216; Johandes v. C. M. & St. P. R. Co., 260 Ill. App. 328, with other cases, that this question is not always one for the jury. These cases, as many others which might have been cited, state the rule that it is necessary for a plaintiff in such cases to show by affirmative evidence that he was at and just before the accident in the exercise of ordinary care, and that where there is any evidence from which a jury could reasonably find that he was in the exercise of such care, the question is then for the jury.

The law on these points is too well settled to require extended discussion. The evidence for plaintiff tends to show that the hole (which one witness stated to be about knee deep) into which plaintiff fell had existed for some time, and that about two weeks prior to the night upon which plaintiff was injured a lantern had been placed there which, however, had been missing some days prior to the accident. In view of all the circumstances, the season of the year, the time of day, the downpour of rain, and the absence of this lantern, the question of whether plaintiff was guilty of contributory negligence which would bar his recovery, was for the jury. This case is quite unlike the case of Johandes v. C. M. & St. P.R.Co. upon which defendant relies, where it appeared that the driver of an automobile on a foggy night, knowing he was approaching a dangerous railroad crossing, kept dimmers on his headlights and proceeded to

he started to run and out across the corner when he stepped into
the hole, which was under the sidewalk, and fell.
Defendant says that there is no evidence tending to
show that plaintiff was in the exercise of duty for his own safety,
and a number of cases, such as Heidinger v. Heiderich, 100 Ill. 420;
Elison v. Ill. Coal & Oil Co., 111 Ill. 203; Barney v. Chicago,
217 Ill. 124, are cited in this regard. Defendant also mentions
Chicago v. Jones, 100 Ill. 420, and Ill. 124, 203;
Barney v. Chicago, 111 Ill. 203; Heidinger v. Heiderich, 100 Ill. 420;
N. E., 280 Ill. App. 203, with other cases, that this question is
not always one for the jury. These cases, in many places which
might have been cited, show that it is necessary for a
plaintiff in such cases to show by affirmative evidence that he was
at that place and engaged in the exercise of his duty.
and that there is any evidence from which a jury could
reasonably find that he was in the exercise of such duty. The
question is this for the jury.
The law on these points is too well settled to require
extensive discussion. For instance the plaintiff herein is now in
the hole (which one witness stated to be about knee deep) into which
plaintiff fell and against the wall, and this shows that
prior to the night upon which plaintiff was injured a lantern had
been placed there which, however, had been missing some days prior
to the accident. In view of all the circumstances, the reason of
the fact, that at the time of the accident of fall, and the absence of
this lantern, the question of whether plaintiff was guilty of con-
tributory negligence would be for the recovery, was for the jury.
This case is fully within the rule of Heidinger v. Heiderich, 100 Ill. 420;
and other authorities cited, which it is suggested that the court should
reaffirm with finality, leaving no room for discussion or further

cross at a dangerous rate of speed. This court cannot say that the verdict is in that respect clearly and manifestly against the weight of the evidence.

An examination of the evidence on the question of damages leads us to the conclusion that the verdict is excessive.

Plaintiff testifies that when he fell into the hole his hands struck the pavement and were numbed; that some glass got into his right hand and took the skin off both hands inside; that the pavement struck the lower part of his back; that there was a terrific downpour of rain; that the hole had filled up and the street was full of water; that he finally managed to pull himself out of the hole; that he went home and got in the bathtub, turned on the hot water, put hot applications on his feet and cleaned out the bruises. He says that his skin was bruised; that he got the dirt out of his hand the best he could and bound up his hand and ankle with an antiseptic, the name of which he does not remember; that his ankle swelled up and was discolored; that the next morning a friend called a taxicab for him and he went to a doctor's office; that the doctor put his foot in hot water and then gave light and electrical treatments; that the doctor probed the glass out of his right hand, treated his hand, then massaged his back with an electrical machine and turned a light on his back; that he went back daily for additional treatments for about three weeks. He says, "I was practicing law at that time, but was not able to continue my practice immediately after this injury. I was out of my office in the neighborhood of two months, just about two months." He says that his average earnings were about \$300 a month, and that he paid the doctor \$135 for the medical treatment rendered.

Defendant points out that plaintiff's alleged disability was not such as to prevent him from serving the statutory notice in person on April 24, 1929, which was less than a month

after the alleged accident. This court is inclined to the view that injuries as slight as these to a lawyer's hands and legs ought not to entirely incapacitate him for the practice of his profession. We find the damages to be excessive and that the trial court should have granted the motion for a new trial or demanded a remittitur. If plaintiff within ten days will remit from the judgment obtained the amount of \$400, the judgment will be affirmed; otherwise it will be reversed and the cause remanded for another trial.

AFFIRMED UPON REMITTITUR; OTHERWISE
REVERSED AND REMANDED.

O'Connor, P. J., and McCurely, J., concur.

35028

TERESA M. GOTTSCHALK,
Plaintiff in Error.

v.

FRED BECKLENBERG et al.,
Defendants in Error.

327
ERROR TO SUPERIOR
COURT, COOK COUNTY.

264 I.A. 621

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

Complainant has sued out this writ of error to reverse a decree of the superior court, entered March 29, 1930, wherein the court sustained the general and special demurrer of Fred Becklenberg and the other defendants to complainant's second amended bill and dismissed the bill for want of equity.

The original bill was filed on April 23, 1929. In the second amended bill, filed by leave of court on October 29, 1929, only Becklenberg, his wife, Maria, and Bene W. Galow, as receiver of the "Burwood Apartments," are made parties defendant. The prayer is in substance that a "purported release," dated May 3, 1926, given by complainant to Becklenberg, "be annulled and cancelled;" that Becklenberg and wife be required to convey to complainant the "Montrose avenue property," if he should now own it, and that Becklenberg be required to account for all rents and profits collected by him therefrom since he acquired title; but should it appear that other persons not parties to this suit, in good faith for value and without notice, have acquired good title to the property, that Becklenberg be required to account to complainant as to all dealings and transactions between him and her; that their respective rights and interests be ascertained; that he be ordered to pay to her what monies, if any, shall appear to be due to her on such accounting, together with costs and solicitor's fees; and that she may have such further relief as equity may require, etc.

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THESE ARE THE NAMES OF THE PERSONS WHOSE NAMES WERE ON THE LIST.

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— a member of the English Court, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535,

The court awarded the General and Special Counsel of the

10-10-1964

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The original will was filed on April 28, 1929. In the

second amended bill, filed by House of Representatives on January 20, 1933.

My Neighbors, Mrs. W. L. Baker, and Mrs. W. L. Baker, as receiver

The "Hawthorne Agreement" was made in the following manner:

novis, 2001, 5 gms each "C. concolor" in each collection at a

YOUNG, J. H. (1964) The ecology of the Great Lakes. University of Michigan Press, Ann Arbor, Michigan.

schlechte und nicht zu empfehlen ist die "Kochschüssel"

venue property," it be should not own it, and that machinery be re-

mirrored to account for all funds collected by the Government

There is no question that the above information is true and correct.

...to the fact that the ...

and the following results are obtained:

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

and that their respective rights and interests are not impaired;

has been indicated to help to last night. It will appear to

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. The next step is the collection of data. This is done by the investigator who is responsible for the investigation. The investigator must collect data from the sources that are available. The next step is the analysis of the data. This is done by the investigator who is responsible for the investigation. The investigator must analyze the data and determine the cause of the problem. The next step is the development of a solution. This is done by the investigator who is responsible for the investigation. The investigator must develop a solution that will solve the problem. The next step is the implementation of the solution. This is done by the investigator who is responsible for the investigation. The investigator must implement the solution and monitor the results. The final step is the evaluation of the results. This is done by the investigator who is responsible for the investigation. The investigator must evaluate the results and determine if the solution was effective.

In defendants' demurrer to the bill the following causes of demurrer, here argued by their counsel, are stated: That it appears from the face of the bill (a) that complainant has been guilty of laches, "in that she stood by and permitted Sol Rubin to be the owner of the property and to collect the rents and income thereof without at any time asserting her rights, and permitted him to deal with Becklenberg;" (b) that the rights and interests of the parties "were adjudicated by the various decrees set forth in the bill;" (c) that complainant "is not in position to put these defendants in statu quo;" and (d) that she "has executed her release deed, releasing Becklenberg from any alleged fraud, and that it was not the duty of Becklenberg to disclose to her the things therein alleged, he having no fiduciary relationship towards her."

The present transcript discloses that on March 29, 1930 (when said demurrer was sustained, etc.), the chancellor engaged in what appears to us an anomalous practice. He entered a long decree (drafted by defendants' solicitors) in which are made many findings of fact (as if there had been a trial upon evidence adduced) taken from allegations of complainant's two prior bills (to which demurrers previously had been sustained) as well as from allegations contained in said second amended bill, also taken from certain documents which complainant had attached to the prior bills and which by reference had been made part of the second amended bill, and also taken from certain statements made in the written briefs and oral argument of the respective solicitors on the hearing upon the demurrer. The decree is similar in form to a final decree after a trial had upon the merits except that it concludes that "for these reasons, and other reasons appearing upon inspection of said second amended bill, it is, therefore, ordered and decreed that said demurrer * * be sustained, and said second amended bill, and all proceedings herein commenced, be and the same are hereby dismissed for want of equity." The

sole question then before the superior court for decision was, whether the well pleaded facts, as alleged in said second amended bill, stated on its face such a case as entitled complainant to the relief prayed for (an accounting from Becklenberg, etc.) and as required defendants to file an answer thereto. And the sole question before us on this writ of error is, whether the court erred in sustaining said demurrer and in dismissing said bill. The allegations of the bill are in substance as follows:

That on April 26, 1924, Becklenberg was the owner of certain real estate (describing it) at the corner of Wrightwood avenue and Burling street, Chicago; that in order to improve the same with a thirty-apartment building to be known as the "Burwood Apartments," he on said day entered into a contract with George M. Forman & Co., a corporation, of Chicago, for a loan of \$140,000 to be secured by said property, - the proceeds to be advanced to him from time to time as the building progressed; that the Forman Co. agreed to dispose of a bond issue in that sum; that on May 1, 1924, Becklenberg and wife conveyed the property to Charles Forman, as trustee, to secure said bonds; that in July, 1924, it was found that the cost of the building was materially less than stated in the contract, whereupon the Forman Co., "refused to complete the payments upon the loan unless the same was reduced;" and that on July 22, 1924, a written contract was made between Becklenberg and the Forman Co. (copy attached to the first amended bill and made a part of this bill), wherein it was agreed that "\$10,000 of said bonds be returned and delivered to Becklenberg," that the same be made a lien upon said premises but "subordinate to any other of said bonds at any time outstanding," that said subordinated bonds "would under no circumstances be purchased by said Forman Co.," but that in the event of the sale of the premises by Becklenberg said bonds would be his property and the company would collect all interest thereon and remit the same to him.

That on October 1, 1924, complainant was the owner in fee simple of certain premises (describing them), known as 848 Montrose avenue, Chicago, which were improved with an apartment building and five garages; that the premises were then under lease to one Glader at a rental of \$6,000 per year; and that they had a fair cash market value of \$36,000 and "were free and clear of all incumbrances."

That in November, 1924, Becklenberg proposed to complainant "an exchange of her said property for said Burwood Apartments;" that he then represented to her that the Burwood Apartments property was then "of the fair cash value of not less than \$240,000," that all apartments in the building were rented to "good and responsible" tenants, each of whom he had "carefully selected," that "the net annual rental from the building was not less than \$26,000," and that such rental was sufficient to pay for the maintenance and operation of the building and taxes, and also to pay for all interest on said first mortgage bonds, and also to make all necessary payments which would be required on a \$15,000 junior mortgage which he proposed she should give to him in the event the properties were exchanged.

That on or before December 1, 1934, Becklenberg, in order to induce complainant to make the exchange, delivered to her an illustrated circular, issued by and in the name of the Forman Co., (copy attached to first amended bill and made a part of this bill) in which it was represented that said bond issue was a first mortgage lien upon the Burwood Apartments property "for the full sum of \$140,000 and not less;" that neither by the circular nor by any statement of Becklenberg was any reference made to the subordination agreement of July 22, 1934; that Becklenberg, however, then well knew that the Forman Co. "had refused to advance or underwrite more than said sum of \$130,000" upon the property as security; that complainant was then ignorant of said agreement and of Forman Co.'s said refusal; and that it was Becklenberg's duty then to inform her of these facts, which he did not do.

That on or before December 1, 1934, Becklenberg also falsely and fraudulently represented to complainant that the Burwood Apartments building had been fully completed and was fully rented and in good condition, that the net rental was over \$26,000 per year as stated in the circular, that the fair cash value of the land and building was not less than \$240,500, as stated in the circular; that at the time Becklenberg knew that said representations were "materially untrue and misleading;" that Becklenberg, with intent to secure the confidence and trust of complainant, further represented to her that the Forman Co., for more than 30 years, had been making and selling real estate securities and had "followed a policy of rigid investigation, conservative valuations and cautious procedure," that so thorough and effective had been its methods that in said period "no customer had ever lost a single dollar in principal or interest on any Forman investment, and that he (Becklenberg), as stated in the circular, was and had been favorably known in Chicago as a real estate operator, which representations were materially false and deceived complainant; that Becklenberg further falsely represented, as stated in the circular, that he had been exceptionally successful in his building projects and was reliably reported to be worth in excess of one million dollars; and that said representations of Becklenberg and said statements in the circular were relied upon by complainant and were false and misleading and were known by Becklenberg at the time to be such.

That at all times during her said negotiations with Becklenberg, complainant was sick, in a nervous condition, and confined to her home, and was so ill as to be unable to make, and did not make, any investigations as to Becklenberg's representations as to said apartment building and said bonds; that she relied upon his representations, believing them to be true; that she was then, as now, a widow and had had little business experience; that she was ignorant of the real value of said apartment building, the reasonable rental value thereof and the cost of operating the same; that after the exchange of properties had been made she was informed, and so states the fact to be, that at the time said representations and exchange were made, the "fair cash market value of said Burwood Apartments property was not in excess of \$135,000, and that the gross annual rentals therefrom did not exceed \$26,000," all of which facts Becklenberg then knew.

That relying upon said representations, and being then ignorant of the falsity thereof, complainant made the exchange of properties; that on December 1, 1934, Becklenberg and wife conveyed to her by warranty deed the Burwood Apartments property, subject to

said mortgage bond issue of \$140,000 and also subject to said junior mortgage for \$15,000, which together with her note in said amount she had given to Becklenberg; that she conveyed to him by warranty deed her said Montrose Avenue property, "free and clear of all incumbrances," except taxes; and that her note of \$15,000, secured by said junior mortgage, was made payable as follows: \$400 on January 1, 1925; \$400 on the 1st day of each and every succeeding month for nine months; \$250 per month on the 1st day of each and every month, beginning November 1, 1925, for 25 succeeding months; and a final payment of \$4750 on December 1, 1927.

That during December, 1924, complainant took possession of the Burwood Apartments property; that thereafter and within a period of about five months, without fault or neglect on her part, about 17 tenants left the building, being insolvent and unable to pay rent; that they were not "good and responsible" tenants as Becklenberg had represented; that about June 1, 1925, about one-half of the building became vacant, although she carefully and diligently managed the building; that thereafter the income from the building proved to be inadequate to make the payments on her said obligations so assumed and falling due; that on September 28, 1925, because of her defaults in not making certain due payments, Becklenberg filed a bill against her in the circuit court to foreclose said junior mortgage of \$15,000, and had one N. Higgins, then his private secretary, appointed as receiver of the property; and that said Higgins took possession as such and thereafter collected rents.

That about October 1, 1925, complainant employed a Chicago attorney to represent her in said suit, but that he became ill and was confined in a hospital and she was without funds to employ other counsel; that about January 30, 1926, Becklenberg secured a decree by default in said foreclosure suit; that on April 1, 1926, there was a sale under the decree, whereby Becklenberg purchased the Burwood Apartments property "for the sum of \$17,000," subject to said first mortgage, a certificate of sale was issued to him, and a deficiency decree entered in his favor against complainant for \$4,468.42; that Becklenberg immediately assigned said certificate of sale to one Sol Rubin, who on April 2, 1926 assigned the same, without consideration, to one E. L. George, an attorney; that the certificate of sale was recorded about August 26, 1926; that early in April, and after said assignment to said George, complainant first met Rubin; that, without knowledge that said certificate of sale had been assigned by Becklenberg to Rubin, complainant entered into an agreement with Rubin, whereby he agreed "to represent her in securing a settlement with Becklenberg which should be to her advantage" for damages received by her on account of her said transactions with Becklenberg; that on or about May 1, 1926, Rubin (having acquired by quitclaim deed from complainant her equity in the property) "secretly and without her knowledge," entered into an agreement with Becklenberg, whereby the latter agreed to permit said receiver to be discharged without filing any account and "to turn over the possession of said Burwood Apartments property to Rubin, together with all rents and profits to accrue therefrom and to satisfy said deficiency decree against complainant, but upon condition that Rubin should secure from complainant a release and discharge from all claims she might have against Becklenberg on account of his said frauds and misrepresentations;" that about this time Rubin proposed to complainant that she make a settlement with Becklenberg, wherein and whereby, in consideration of Becklenberg accepting a less sum of money than he claimed was due to him, she would release and discharge Becklenberg from all her claims and demands against him on account of his said

frauds and deceits, and that, upon said release being executed by her, Becklenberg would satisfy said deficiency decree against her, assign to her said certificate of sale, cause said receiver to be discharged, and deliver to her possession of the Burwood Apartments property; and that at this time, and at all times theretofore, she was without knowledge that said certificate of sale had already been assigned to Rubin, and also was ignorant of Becklenberg's secret agreements with Rubin and with said Forman Co., and also was ignorant of her rights and interests, - all of which Becklenberg had knowledge and was under the duty of disclosing to her the true facts, which he fraudulently did not do.

That on May 3, 1926, complainant, while so ignorant and so deceived as aforesaid and without the advice of counsel, accepted the proposed settlement and signed and delivered (Rubin witnessing her signature) a form of release, which had been drafted by Becklenberg and which "purported to release Becklenberg from all claims for fraud she might have against him, growing out of said false representations made by him at the time of making said exchange of properties;" (copy attached to first amended bill and made a part of this bill); that at the time she executed and delivered the release Becklenberg well knew that she was ignorant of the facts aforesaid, and he concealed the same from her, i.e., that the certificate of sale had been assigned to Rubin on April 1, 1926, that the Forman Co. had refused to underwrite said first mortgage bond issue for more than \$130,000, or that there was the subordination agreement between Becklenberg and the Forman Co.; and that had complainant known of said facts at the time she would not have signed and delivered said release.

That at the time complainant executed the release Becklenberg presented to her a stipulation, which at his request she signed, for the discharge of said Higgins as receiver, without requiring any final account from her as such, whereby Becklenberg received certain large sums of money which had been collected from tenants for rent, and to which complainant was equitably entitled and which Becklenberg appropriated to his own use.

That thereafter on December 15, 1926, default having been made in the payment of certain principal and interest due on certain of said bonds, secured by said first mortgage, of the par value of \$2500, said Charles Forman, as trustee, filed a bill in said circuit court to foreclose said first mortgage and caused one Beno W. Galow to be appointed receiver of the Burwood Apartments property, and said receiver took possession and collected rents and is still in possession; that complainant was not made a party defendant to said bill; that from early in April, 1926, when she first met Rubin, until about May 1, 1928, complainant, upon Rubin's advice, did not employ or attempt to employ any solicitor to represent her in either of said foreclosure proceedings; that after all testimony had been taken in the proceedings for the foreclosure of said first mortgage, and when a decree was about to be entered, she for the first time discovered during June, 1928, that said certificate of sale, which Becklenberg had contracted to assign to her, had in fact before then been assigned to Rubin; that she lost confidence in Rubin and employed counsel; that on or about July 3, 1928, she petitioned said circuit court to be allowed to intervene in the foreclosure proceeding of said first mortgage, but that on November 5, 1928, said circuit court denied her petition.

That complainant never at any time personally received any net income from said Burwood Apartments property, but that on the contrary she was compelled to expend, and did expend, large sums of money over and above such income as she did receive for the upkeep of the building; that although often requested Becklenberg has refused to make restitution to her for the loss and damages sustained by her by reason of his said false and fraudulent representations, and has refused to account to her; that she is now ready and hereby offers to pay to him what if anything is justly due to him upon a full and just accounting.

After a careful consideration of the allegations of complainant's said bill, as well as the briefs and arguments of respective counsel and certain adjudicated cases, we have reached the conclusions that the bill stated such facts, and made out such a prima facie case against Becklenberg for an accounting, etc., as warranted an answer being filed by him and a hearing had upon the merits, and that the superior court erred in sustaining defendants' demurrer to the bill and dismissing it for want of equity.

We are of the opinion that Becklenberg's alleged false representations as to the amount of the Forman Co.'s loan, and his concealment of the forced reduction thereof by said company, concerned material facts and were not mere expressions of opinion as to the value of the Burwood Apartments property. (White v. Sutherland, 64 Ill. 181, 186-7; Leonard v. Springer, 197 id. 532, 537; Dougllass v. Treat, 246 id. 593, 602-3; Biewer v. Mueller, 254 id. 315, 325.) And we think that, even though it be considered that the parties were dealing at arms' length and that said false representations were made as to facts equally open to inquiry by complainant, yet if said false representations induced complainant to act to her prejudice Becklenberg cannot impute negligence to her because of her reliance on said representations as alleged. (Leonard v. Springer, 197 Ill. 532, 539; Dougllass v. Treat, 246, id. 593, 603; Woodruff v. Day, 278 id. 199, 205; Herpich v. Williams, 300 id. 540, 546.) And we think that the alleged fraudulent procurement by Becklenberg from complainant of her release (releasing him from the consequences of his prior

fraudulent representations), renders such release voidable by her in equity and subject to cancellation at her instance. (See Montes v. Peek, 296 Pac. Rep. (Calif.) 624, 636-7.) And we do not think that from the allegations of the bill it appears that complainant was guilty of laches, barring the relief prayed for. She acted reasonably prompt after the discovery of the fraud, practiced upon her by Becklenberg as claimed. In Egan v. Grady, 343 Ill. 423, 429, it is said: "There is no laches, however, where there is neither knowledge nor the means of knowledge, and delay will not bar relief where the party who has been damaged has been ignorant of the fraud. The duty to institute suit arises only upon the discovery of the fraud perpetrated." (See, also, Verhees v. Campbell, 275 Ill. 292, 325.) In Schultz v. O'Hearn, 319 Ill. 244, 247-8, it is said: "The objection of laches may be made by demurrer when it appears on the face of the bill. * * There is no absolute rule as to what constitutes laches, it must be determined from the facts of each particular case. * * A confessed wrongdoer, who has not been misled, deceived or harmed by the delay of the person injured in asserting his legal remedies, has no cause of complaint that he was not sooner called to account for his wrongdoing." And we do not think that there is any substantial merit in any of the other points, here urged by defendants' counsel as grounds for sustaining the action of the superior court complained of.

The judgment here in question is reversed and the cause is remanded with directions to the superior court to overrule defendants' demurrer to complainant's second amended bill.

REVERSED AND REMANDED WITH DIRECTIONS.

Kerner and Scanlan, JJ., concur.

35217

CALOGERO OSCAR RUBINELLI,
Complainant and Appellee.

v.

ENVOY BUILDING CORPORATION et al.,
Defendants.

ON APPEAL OF FRANK W. BRANIGAR and
HARVEY W. BRANIGAR, trading as
Branigar Bros.,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

264 I.A. 622

MR. PRESIDING JUSTICE GRIDENTY DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the separate appeal, No. 35216, of Clyde F. Frazier from a decree of the Superior court of Cook county, entered March 19, 1931. We have this day filed an opinion as to both appeals in cause No. 35216. For the reasons therein stated the decree as to Branigar Bros. is reversed and the cause remanded with directions to dismiss complainant's second amended bill as to Branigar Bros. for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Kerner and Scanlan, JJ., concur.

7154

CONFIDENTIAL

As the weather improves, the number of people who go to the beach increases.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY. THE
REASON FOR THIS IS THAT THE WORLD IS FULL OF
MISERY AND PAIN. THE ONLY WAY TO GET OUT OF
THIS IS TO LIVE A LIFE OF LOVE AND KINDNESS.
THE ONLY WAY TO GET OUT OF THIS IS TO LIVE A
LIFE OF LOVE AND KINDNESS. THE ONLY WAY TO
GET OUT OF THIS IS TO LIVE A LIFE OF LOVE
AND KINDNESS. THE ONLY WAY TO GET OUT OF
THIS IS TO LIVE A LIFE OF LOVE AND KINDNESS.

35242

347

CATHERINE SOEFFKER, administratrix
of estate of Julius Soeffker,
deceased,

Appellee,

v.

BRUNO FRED ANDRESEN and BUNKER HILL
COUNTRY CLUB, a corporation,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

264 I.A. 622

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The present appeal is taken from a decree entered March 14, 1931, in which the superior court, contrary to the recommendation of the master that complainant's bill be dismissed for want of equity, ordered and adjudged:

That the defendant, Andresen, forthwith surrender and deliver to complainant, or to her solicitor, "two certain certificates of preferred and common stock in the defendant Bunker Hill Country Club, a corporation, now held by him * *, being certificate numbered 29 for twenty (20) shares of the preferred stock and certificate numbered 25 for ten (10) shares of the common stock of said corporation, free and clear of all liens, rights and claims of said Andresen upon or against each of said certificates and the shares of stock thereby represented;" that said corporation, upon the surrender to it of said certificates (each of same then bearing the endorsement of complainant as administratrix, etc.), "shall forthwith issue to her as such administratrix new certificates for ten (10) shares of its common and for twenty (20) shares of its preferred stock, respectively, each and both of same as being fully paid and non-assessable, pursuant to the similar tenor in that respect of said two certificates numbered 29 and 25;" and that, "in the event either that said Andresen shall fail upon said payment to him so to deliver said certificates, and/or said Bunker Hill Country Club shall fail upon such enforcement and surrender to it so to issue such new certificates to complainant, this court expressly reserves jurisdiction of this cause for the purpose of making all such other and further orders for the endorsement of this decree, in that event, as may be proper under the law." (The decree also contains provisions as to defendants paying certain costs to be taxed.)

In the decree the following recitals appear:

That complainant, by her solicitor, in open court, "offers and tenders the sum of \$794.25 to said defendant, Andresen, in full of the indebtedness of said deceased (Julius Soeffker) to said Andresen upon the pledge of the twenty shares of preferred and the ten shares of common stock in said corporation involved in this case (including interest to March 14, 1931, the date of the entry of this decree).

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ALL THE ABOVE INFORMATION WAS OBTAINED FROM THE

That organization, by the addition of the word "Fellowship" to the name of the organization, is now known as the "Fellowship of the Friends of the World" (FOWW). The purpose of the organization is to promote the friendship and understanding between the people of the world and to work for the peace and well-being of the world.

upon the condition that the certificates, representing all of said preferred and common stock, be by said Andresen delivered to said complainant simultaneously with his acceptance of said tender and sum of money;" that thereupon Andresen, by his solicitors, "refuses said tender and refuses to deliver said certificates and stock to complainant;" that thereupon complainant, by her solicitor, "notifies said Andresen and his solicitors that said tender will be kept good at the office of complainant's solicitor in Chicago at and during all usual and ordinary business hours;" and that this cause coming on for hearing upon complainant's bill of complaint the answer of Andresen as amended, the answer of the Bunker Hill Country Club and upon the report of the Master in Chancery (to whom the cause was generally referred) and upon exceptions of complainant and also of Andresen, it is ordered that Andresen's said exceptions be overruled but that complainant's said exceptions be sustained.

And in the decree the court made the following findings in substance:

That the undated contract or writing, signed by the deceased (Seeffker) and set out in complainant's bill, "was so signed on or about August 1, 1924;" that at that time the deceased was not indebted to Andresen and the sum of \$2,000 had not been paid to the deceased by him; that at that time the stock certificates herein involved were not in fact issued to the deceased; that the actual and real understanding of the deceased and Andresen, which they attempted to evidence by said writing, "was that said Andresen was to advance for and on behalf of said deceased the sum of \$2,000 to purchase said stock;" that "said deceased paid to Andresen \$500 on August 15, 1924, and \$500 on November 1, 1924, pursuant to said understanding, for each of which payments Andresen executed the receipts in the name of Bunker Hill Country Club and signed said receipts as president thereof;" that Andresen "turned said sums over to said corporation;" that "on or about February 2, 1925, Andresen further advanced for said Seeffker the further sum of \$1,000 to pay the balance due on Seeffker's stock subscription;" that the stock was then issued to Seeffker but kept by Andresen, and that said sum of \$1,000 was owing from Seeffker to Andresen as of said last mentioned date; that the dividends thereafter paid on said stock and received by Andresen should be credited on said \$1,000; and that Seeffker at the time of his death (May 3, 1929) was indebted to Andresen in said sum of \$1,000 "less the said amounts so received by Andresen as dividends on said stock, with interest at 5 per cent per annum from February 2, 1925, on the balance of said \$1,000 from time to time remaining unpaid after crediting said dividends."

"The court further finds from the evidence, particularly the checks by which said dividends were paid in the years 1926, 1927 and 1928, that Andresen received as dividends the sums of \$120 each on November 15, 1926, November 15, 1927, and October 1, 1928, and from the answer of said Andresen, as so amended, the further sum of \$120 as dividend on said pledged stock in the month of October, 1929, making four dividends of \$120 each by him so received thereon." (Here is stated at length an account, showing a balance due to Andresen on March 14, 1931, of \$792.25.)

The court further finds that there is now owing and unpaid to Andresen under the pledge of said stock said last mentioned sum of \$792.25, which includes interest at 5 per cent per annum to March 14, 1931; that complainant has proved all of the material allegations

of her bill and the equities of the cause are with her; and that she is entitled to the relief as prayed for, "upon and simultaneously with the payment by her to Andresen of said sum of \$792.25, which, as aforesaid, she has so tendered to him in open court * * at the time of the entry of this decree, and has at the same time notified him when and where said tender would be kept good, on condition that said stock should be by him delivered to her simultaneously with the payment of said amount tendered to him, and said tender having been in open court refused."

The undated contract or writing, mentioned in the decree and which on the hearing before the master was produced by Andresen and introduced in evidence by complainant, is written on a letterhead of the Bunker Hill Country Club, was drafted by Andresen, and is as follows:

"To whom this may concern:

For and in consideration of the sum of \$2,000 advanced to me by B. F. Andresen, I hereby certify that I have deposited with said B. F. Andresen 20 shares of preferred stock of the Bunker Hill Country Club and 10 shares of common stock of the Bunker Hill Country Club which shares will become his property if I do not redeem them by paying back the said \$2,000 within 10 years.
(Signed) J. L. Soeffker"

It will be noticed that no mention is made in the instrument as to payment or rate of interest; also that the pledge is of shares of stock; nothing is stated showing the then existence of certificates for the stock. The two receipts, also mentioned in the decree and which after the death of Soeffker came into the possession of complainant as administratrix and were introduced in evidence by her, are each on printed forms (the herein italicized portions being in Andresen's handwriting) and are as follows:

"Aug. 15 1924

Received from Julius Soeffker
Five Hundred and no/100 -----Dollars.
First Quarter Payment
on Subscription of Stock.
\$500.00

BUNKER HILL COUNTRY CLUB
per B. F. Andresen

- - - - -

Nov. 1, 1924

Received from Julius Soeffker
Five Hundred and no/100 -----Dollars.
Second Quarter Payment
on Subscription of Stock.

BUNKER HILL COUNTRY CLUB
per B. F. Andresen.
Fren."

\$2500.00

The prayer of complainant's bill, filed November 6, 1929, was in substance that the amount actually and legally unpaid to Andresen, under and by virtue of said undated pledge contract, be ascertained upon an accounting; that upon this accounting complainant be credited with all dividends which had been received by Andresen and which had been declared by said corporation (Bunker Hill Country Club) on the stock herein involved; that upon said amount being ascertained and being tendered or paid to Andresen, he be required to deliver the stock to complainant, and that upon her endorsement of the certificates thereof said corporation be required to issue new certificates to her as administratrix; and that she have such further relief as equity may require, etc.

The theory of Andresen's defense, as appears from his twice amended answer and as here set forth in the brief and argument of his counsel, is in substance that said undated contract or writing was in fact executed on or about February 4, 1925, up to which time there had been advanced by Andresen \$500 on August 15, 1924, \$500 on November 1, 1924, and \$1,000 on February 4, 1925, - in all \$2,000; that Soeffker never paid any sums of money to Andresen "with the exception of six per cent interest on the loan of \$2,000 evidenced by said four dividend checks" of \$120 each; that there is also due to Andresen interest at 6% for the year 1925, as evidenced by a dividend check dated November 15, 1925 for \$120, "which money was kept and used by Soeffker;" that at the time of the filing of complainant's bill there was due to Andresen "the sum of \$8120 and not the sum of \$793.25;" that the four dividend checks of \$120 each, for the years 1926, 1927, 1928 and 1929, "were collected and used by Andresen with the knowledge and consent of Soeffker;" that "they did not represent any payments

on said undated contract or writing;" that because the legal rate of interest in this State is 5% per annum "it would appear that Andresen has overchargedoeffker \$20 on each of the interest payments" (i.e., made by said dividend checks for said last mentioned years); and that, hence, the net indebtedness due to Andresen on said pledged stock in his possession is \$2040, plus further accrued interest to date at 5% per annum. It was not contended upon the hearing, nor is it here contended, that complainant is not entitled to obtain possession of the stock herein involved, upon paying to Andresen what is legally due to him. The dispute was and is what is the true amount due to him on his loan tooeffker, for which he holds said stock as security. It is, however, here further contended by his counsel that complainant "failed in her proof," that the allegations of her bill "have not been sustained," that the decree "is variant therewith," and that she "is not entitled to any relief" in this proceeding.

The master in his report recommended that complainant's bill be dismissed for want of equity because "there is no sufficient connection shown by complainant between the undated document and the two receipts of the Bunker Hill Country Club, dated August 16, 1924 and November 18, 1924, for the master to find that any payments were ever made by the decedent to Andresen upon the indebtedness shown by said undated document." The court did not adopt the recommendation of the master or agree with the master's reason therefor, and, after carefully reviewing the present transcript, we cannot. It is probable from his report that the master was doubtful as to the soundness of his recommendation because, after therein stating an account (on a somewhat different method of accounting than that adopted by the court) showing that up to the date of the report (October 24, 1930) "there was a balance unpaid upon said stock due to Andresen" of \$388.98, he further stated that "this computation is made to show the balance

an said indebted contract or similar, that because the legal rate
of interest in this State is 6% per annum "it would appear that
interest has overcharged something like one each of the interest
payments" (i.e., made by said dividend checks for said last men-
tioned years); and that, hence, the net indebtedness due to Anderson
on said dividend check in his possession is \$2000, plus further accrued
interest at rate of 6% per annum. It was not contended upon the hear-
ing, nor is it now contended, that complaint is not entitled to
summary judgment on the issue which plaintiff has framed in
Anderson and is legally due to him. The dispute was and is what is
the true amount due to him on his term to plaintiff, for which he claims
said check as security. It is, however, here further contended by
the counsel that complaint "failed in her proof," that the
allegation of her bill "has not been explained," and the issue
"is without merit," and that she "is not entitled to any relief"
in this proceeding.

The master in his report recommended that complaint's
bill be dismissed for want of equity because "there is no establishing
satisfaction shown by complaint between the dividend received and the
amount of the debt which will satisfy that which is due to her
and November 12, 1922, for the reason so find that any payments were
ever made by the defendant to plaintiff since the indebtedness shown by
said dividend check." The court in its report the recommendation
of the master as agreed with the court's reasons therefor, and, after
carefully reviewing the master's findings, the court, it is probable
from his report that the master was doubtful as to the amount of
his recommendation because, after therein stating an account (on a
somewhat different method of accounting than that adopted by the
court) showing that up to the date of the report (October 24, 1922)
"there was a balance unpaid upon said check due to Anderson" of \$222.00
he further stated that "this computation is made so show the balance

due in case the master's conclusions are not sustained by the court."

After carefully considering the allegations and prayer of complainant's bill, the admissions of Andresen in his twice amended answer, the oral and documentary evidence introduced upon the hearing by the respective parties, and the briefs and arguments of counsel, we are of the opinion that the decree appealed from is amply sustained by the evidence, is in accordance with equitable principles, and should be affirmed. We think it sufficiently appears that said undated contract or writing (drafted by Andresen) was in fact signed and delivered by Soeffker on or about August 1, 1924, that the receipts to Soeffker of August 18, and November 1, 1924, above set forth, evidenced payments by him at said times on said contract or on the stock involved and that said contract constituted a valid and mutually enforceable equitable pledge of the stock not then technically in case, for which the Bunker Hill Country Club (of which Andresen was president and the active manager), afterwards on February 2, 1925 and during Soeffker's lifetime, issued two certificates in Soeffker's name, and which certificates were then endorsed in blank by him and delivered to Andresen by virtue of said pledge contract. It is well settled that "contingent interests and expectancies, and things having no present existence but which rest only in possibility, may, by contract bona fide made and for a sufficient consideration, be assigned so as to be binding in equity; such a contract will be enforced in equity after the subject matter of it has come into existence." (Hudnall v. Ham, 183 Ill. 436, 500; Crum v. Sawyer, 132 id. 443, 460; Jarvis v. Binkley, 206 id. 541, 547.)

The decree of the superior court of March 14, 1931, should be affirmed and, accordingly, such will be the order.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

was in fact the subject of investigation by the

State.

After carefully considering the allegations and proper

of complaints, a bill, the substance of which is his

present report, has been and is being introduced into

the Senate by the respective parties, and the House and Senate

of course, we are of the opinion that the House reported from it

fully satisfied by the evidence, is in accordance with applicable

principles, and should be affirmed. It is in fact a bill

that will protect against the further introduction of

such signs and delivered by letter on or about August 1, 1904.

That the receipt is further of August 1, and November 1, 1904.

above and forth, witnesses hereto by him at said time on said con-

tract or on the stock involved and in a case contract contained a

bill and annually - certain - certain - certain - certain -

from September 1, 1904, but under the contract will remain the

which Anderson was president and the active manager, afterwards on

February 1, 1904 and during Anderson's lifetime, under the contract

made in Anderson's name, and which Anderson was the owner of

in plain by him and delivered to Anderson by virtue of said pledge

contract. It is well settled that "contractual interests and expect-

ations, and interest under the contract and under the contract

in possibility, not, by contract of said time made and for a contract

consideration, be assigned as to be binding in equity with a

contract will be enforced in equity after the subject matter of it

has been fully explained. (Citation) - See also the case of

State v. Anderson, 100 N. H. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

be affirmed and, accordingly, such will be the order.

ORDER.

Witness my hand and seal, this 10th day of

35172

BABKA PLASTERING CO., a
corporation, WILLIAM NOWALNEK,
HELEN CAMPBELL and JERRY O.
NOVAK, (complainants),
Appellees.

v.

CITY STATE BANK OF CHICAGO
et al.,
Defendants.

ON APPEAL OF SAMUEL E. ALLISON,
FRED BECKER, PETER H. BEHL,
TIMOTHY CRIMMINGS, LEO C. HAAS
and D. S. KOMISS,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

264 I.A. 622³

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This appeal is one of five causes consolidated for hearing with cause No. 35171, where the facts are practically identical and where in an opinion this day filed both law and facts have been considered, and the decree of the Circuit court has been affirmed.

For the reasons stated in that opinion the same order is entered in this cause.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

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SUBJECT :

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WASHINGTON, D.C.

35173

BABKA PLASTERING CO., a
corporation, WILLIAM HORALEK,
HELEN CAMPBELL and JERRY O.
NOVAK, (complainants),
Appellees,

v.

CITY STATE BANK OF CHICAGO
et al.,
Defendants.

ON APPEAL OF SAMUEL B. ALLISON,
FRED BECKER, PETER H. BAHL,
TIMOTHY CHIMMINGS, LEO C. HAAS
and D. S. KOMISS,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

264 I.A. 522⁴

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This appeal is one of five causes consolidated for hearing with cause No. 35171, where the facts are practically identical and where in an opinion this day filed both law and facts have been considered, and the decree of the Circuit court has been affirmed.

For the reasons stated in that opinion the same order is entered in this cause.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

1947

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35174

BABKA PLASTERING CO.,
a corporation, WILLIAM MORALEK,
HELEN CAMPBELL and JERRY O.
NOVAK, (complainants).
Appellees.

v.

CITY STATE BANK OF CHICAGO
et al.,
Defendants.

ON APPEAL OF SAMUEL B. ALLISON,
FRED BECKER, PETER H. BEHL,
TIMOTHY CRIMMINGS, LEO G. HAAS,
and D. S. KOMISS,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

264 I.A. 622

MR. JUSTICE KNEER DELIVERED THE OPINION OF THE COURT.

This appeal is one of five causes consolidated for hearing with cause No. 35171, where the facts are practically identical and where in an opinion this day filed both law and facts have been considered, and the decree of the Circuit court has been affirmed.

For the reasons stated in that opinion the same order is entered in this cause.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.



DATE

THE FOLLOWING IS A SUMMARY OF THE RESULTS OF THE SURVEY OF THE
WATER RESOURCES OF THE STATE OF TEXAS, FOR THE YEAR 1900.

1900

THE TOTAL AREA OF THE STATE OF TEXAS IS 695,621 SQUARE MILES.
OF WHICH 1,100,000 ACRES ARE UNDER CULTIVATION.

THE TOTAL AREA OF THE STATE OF TEXAS IS 695,621 SQUARE MILES.
OF WHICH 1,100,000 ACRES ARE UNDER CULTIVATION.

THE TOTAL AREA OF THE STATE OF TEXAS IS 695,621 SQUARE MILES.

THIS REPORT IS ONE OF THE RESULTS OF THE SURVEY OF THE
WATER RESOURCES OF THE STATE OF TEXAS, FOR THE YEAR 1900.
THE TOTAL AREA OF THE STATE OF TEXAS IS 695,621 SQUARE MILES.
OF WHICH 1,100,000 ACRES ARE UNDER CULTIVATION.

THE TOTAL AREA OF THE STATE OF TEXAS IS 695,621 SQUARE MILES.
OF WHICH 1,100,000 ACRES ARE UNDER CULTIVATION.

1900

THE TOTAL AREA OF THE STATE OF TEXAS IS 695,621 SQUARE MILES.

35175

RABKA PLASTERING CO.,
a corporation, WILLIAM HORAIK,
HELEN CAMPBELL and JERRY C.
NOVAK, (complainants),
Appellees,

v.

CITY STATE BANK OF CHICAGO
et al.,
Defendants.

ON APPEAL OF SAMUEL S. ALLINSON,
FRED BROCKEN, PETER H. BEHL,
TIMOTHY CRIMMINGS, LEO G. HAAS
and D. S. KOMISS,
Appellants.

264 L.A. 622

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

This appeal is one of five causes consolidated for hearing with cause No. 35171, where the facts are practically identical and where in an opinion this day filed both law and facts have been considered, and the decree of the Circuit court has been affirmed.

For the reasons stated in that opinion the same order is entered in this cause.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

1910

THE NATIONAL BUREAU OF
STATISTICS
WASHINGTON, D. C.

THE NATIONAL BUREAU OF
STATISTICS
WASHINGTON, D. C.

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STATISTICS
WASHINGTON, D. C.

35177

BABKA PLASTERING CO.,
a corporation, WILLIAM HONALEK,
HELEN CAMPBELL and JERRY O.
NOVAK, (complainants),
Appellees,

v.

CITY STATE BANK OF CHICAGO,
et al.,
Defendants.

ON APPEAL OF SAMUEL B. ALLISON,
FRED BECKER, PATRICK H. BENT,
TIMOTHY CRIMMINGS, LEO W. HAAS
and D. S. KOMISS,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

264 I.A. 622⁷

MR. JUSTICE KRAMER DELIVERED THE OPINION OF THE COURT.

This appeal is one of five causes consolidated for hearing with cause No. 35171, where the facts are practically identical and where in an opinion this day filed both law and facts have been considered, and the decree of the Circuit court has been affirmed.

For the reasons stated in that opinion the same order is entered in this cause.

ATTORNEYS.

Gridley, P. J., and Scanlan, J.: concur.

4458

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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U.S. DEPARTMENT OF JUSTICE
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WASHINGTON, D.C.

* 1990 年 12 月 26 日在北京市召开，由北京、天津、上海、南京、杭州、武汉、成都、西安、昆明、贵阳、拉萨、乌鲁木齐、呼和浩特、包头、太原、石家庄、保定、邯郸、邢台、衡水、廊坊、沧州、德州、聊城、菏泽、济宁、泰安、莱芜、临沂、日照、青岛、烟台、威海、东营、潍坊、淄博、东营、烟台、威海、日照、临沂、泰安、莱芜、济宁、菏泽、聊城、德州、沧州、廊坊、保定、邯郸、邢台、衡水、石家庄、太原、呼和浩特、包头、乌鲁木齐、拉萨、贵阳、昆明、成都、武汉、南京、杭州、上海、天津、北京。

THIS REPORT IS ONE OF THE RESULTS OF THE

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Figure 10.20 shows the results of the analysis. The results show that the mean of the distribution is 10.5, which is the same as the mean of the original data. The standard deviation is 1.5, which is the same as the standard deviation of the original data. The shape of the distribution is the same as the shape of the original data. The results of the analysis show that the distribution of the transformed data is normal, which is the same as the distribution of the original data.

LITTLE AND JONES

For the reasons stated in that opinion the case

...and the ...

Abstract.

TABLE 1. *Continued*

35301

HONORE PALMER and POTTER PALMER,
executors and trustees under the
last will and testament of
BERTHA HONORE PALMER, deceased,
(plaintiffs),

Defendants in Error,

v.

ANDREW McANSH,
(defendant),

Plaintiff in Error.

36 7
ERRON TO SUPERIOR
COURT, COOK COUNTY.

264 I.A. 622⁸

MR. JUSTICE KEMMER DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit brought by plaintiffs against defendant to recover the unpaid balance of the purchase price of certain Florida real estate. Tried by the court without a jury. To reverse a judgment for plaintiffs for \$98,230.25 defendant prosecutes this writ of error.

Plaintiffs' declaration consisted of the common counts and one special count, alleging that on August 1, 1925, in Sarasota county, Florida, defendant entered into a contract with plaintiffs whereby he agreed to purchase from plaintiffs certain real estate in Sarasota county for \$35,300, payable \$13,800 on the execution of the contract, \$13,800 on or before August 1, 1926, \$13,800 on or before August 1, 1927, and \$13,800 on or before August 1, 1928; that defendant has paid only the \$13,800 payable upon the execution of the contract and is in arrears the first, second and third installments, taxes and attorneys' fees. The contract is between Andrew McAnsh, as purchaser, and Honore Palmer and Potter Palmer, not as individuals, but as executors and trustees under the last will and testament of Bertha Honore Palmer, deceased, as the vendors, and is executed thus: "Andrew McAnsh (Seal) Honore Palmer By: H. L. Hollis His Attorney in Fact. (Seal) Potter Palmer by:

1992

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MEMORANDUM FOR THE RECORD

Journal of Management Education 33(1)

. 1986. 第 2 卷. 北京: 中国林业出版社.

This has been taken in account by the following:

100-443887-100

Received 16 July 1987; accepted 10 September 1987

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1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

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Journal of Management Education 34(10):1139-1150

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CONFIDENTIAL

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H. L. Hollis His Attorney in Fact. (Seal) As Trustees under the Last Will and Testament of Bertha Honore Palmer, deceased."

In the contract the land is described by legal description and concludes: "Containing 920 acres more or less; the sale is made subject to (a) All taxes, general and special, levied after the year 1924. (b) All installments of special taxes remaining unpaid as of the date hereof. (c) Acts of the Purchaser and those claiming by, through or under him, and liens due to acts or omissions of the Purchaser and those claiming under him. (d) Rights acquired or hereafter acquired under eminent domain proceedings. (e) Any outstanding turpentine or timber leases." And the vendors agree to give the purchaser for examination an abstract of title, showing title in the vendors, which is to be returned by the purchaser to the vendors within twenty days from the receipt thereof, together with a memorandum in writing showing the objections, if any, which the purchaser has to the title of the vendors. In case material defects are found in the vendors' title and so reported, then if such defects be not cured within sixty days after such notice, the contract shall at the option of the purchaser become absolutely null and void; notice of such election to be given to the vendors, and all moneys paid by the purchaser shall be returned to him. It was also agreed that after the purchaser paid fifty per cent of the purchase price he would be entitled to receive a deed to the property upon delivering to the vendors his notes for the balance of the purchase price secured by mortgage as a first lien on all of said property, the mortgage to contain a provision reserving to the mortgagor the right to have released from the lien, one or more forty acre tracts upon the payment as to the lands to be released a release bonus of \$30 an acre.

The evidence discloses that Bertha Honore Palmer died testate, leaving a will in which she nominated her sons Honore Palmer and Potter Palmer as executors and trustees, and in her will she

M. L. Hollis his attorney at law (oral) in Tennessee under the

Land Act and Decisions of Justice Department, Department.

In the event the land is situated in legal jurisdiction

and otherwise "Containing the same now on land; the same is made

subject to (a) all taxes levied and assessed, either after the year

1911. (b) all assessments or special taxes levied upon or by

the state or county. (c) all taxes levied and assessed by

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empowered them in their discretion to sell on any terms and convey any or all of her property, but she made no provision whatever in her will for the delegation by them of any of the powers conferred upon them under the will; that plaintiffs employed one Henry L. Hollis as manager of the estate and in writing appointed him their attorney in fact, empowering him to sell and execute contracts in their name for the conveyance of any of their property; that some of the Florida real estate was sold in 1923, but in 1924 the estate began actively to sell the lands, the highest number of sales being made in the spring and summer of 1925, and the sales greatly diminished in the spring of 1926; that the boom in Florida real estate ended in the summer of 1926, that after some 100 sales had been made the estate began using a printed standard form of contract; this form left blank for insertion the date of the contract, name of the purchaser, the year taxes were assumed by the purchaser, the amount of cash payment, the number and amount of the deferred payments, the date of the payment of interest on the deferred payments and the amount of the release bonus; that in January or February, 1925, Potter Palmer told Hollis that he (Hollis) could sell the property in question at \$60 an acre, and later, in March or April, 1925, Honore Palmer also told him to sell the property at 100 an acre. On cross-examination Henry L. Hollis testified that the Palmer estate had a great deal of real estate in Florida and had made a great many sales before the execution of the McAnish contract, and that in filling out the form contract he could have filled it out and specified that the entire deferred payments be made August 1, 1926. He was also asked: "Q. You had a conversation, one conversation with Mr. Potter Palmer in January or February, 1925, and another conversation with Mr. Honore Palmer somewhat later. In each and both of these conversations first the one and then the other trustee told you to sell this land for one-fourth cash and three deferred payments payable annually there-

after? A. I cannot say it was put in that language. Q. Well, was that the substance of their direction? A. The substance was we were to sell it at that price per acre, according to our regular procedure, which was the form." He further testified that he had no information "as to whether the described property contained more or less than 920 acres, the descriptions were always checked by the office manager and he reported to me. The procedure would be that a piece of property was sold at a certain price, the description given by letter, or however it was arranged, and the contract would be prepared by Mr. J. E. McGowan, office manager, who would check this against our maps and what other records he might have showing the acreage, and I relied on his approval. * * * When I say the office manager checked the description I do not mean that he checked it to determine whether according to the theoretical content of a section the description corresponded with the number of acres inserted." There was, however, no evidence offered by the defendant that there were not 920 acres in the land described in the contract.

Petter Palmer testified that he had a conversation with Hollis concerning the price for which the land in Township 38, Sarasota county, Florida, was to be sold (the property in the instant case is in Township 38); but that he had no discussion with him as to the terms of payment in the instant case, that he was to follow the general form; that practically all of the land sales made in Florida, unless there was some special exception, were made on these terms, one quarter down and one quarter each year thereafter.

The defendant paid the initial payment of \$13,800 and the semi-annual interest due February 1, 1926; the second payment of \$13,800 under the contract was due August 1, 1926. In a letter addressed to the defendant dated Sarasota, Florida, July 27, 1926, R. E. Thompson, manager of plaintiffs' Sarasota office, said: "Your

letter of July 22nd at hand and am sending under separate cover abstract for 920 acres in sections 15 and 16, township 33 south, range 19 East." Defendant received the abstract about July 27, 1926. It was examined by his attorney and on August 13, 1926, defendant mailed Thompson a letter in which he said that he was sending him the abstract and the opinion of his attorney concerning the title to the land. On August 19, 1926, defendant wrote Thompson that the curing of these objections to the title was a condition precedent to further performance by him and that he was not in default until after the performance of that condition and that he felt that further payment should be deferred until that condition had been complied with by plaintiffs. On September 13, 1926, Thompson wired defendant that he (Thompson) believed six months' extension could be gotten from the Chicago office if defendant would at once accept title insurance (i.e. a guarantee policy), but that the title insurance company could not extend that insurance to defendant's purchaser, but that defendant could get insurance for any purchaser at reduced rates. On the same day defendant, through his attorney, wired Thompson in reply that a title insurance, that was not a guarantee policy extending to purchasers, would not be acceptable and that defendant preferred to have plaintiffs' clear title and was willing to extend the time for clearing the same in exchange for a six months' extension on the August, 1926, payment. On September 13, 1926, Thompson wired defendant's attorney that title was clear, as would appear from Burket's opinion being forwarded. On the same day Thompson wrote defendant's attorney, stating the best way to get an extension was for defendant to accept the title or title insurance. On October 14, 1926, defendant wrote plaintiffs a letter in which he said:

" * * * referring, particularly, to that part of said agreement providing for the purchaser's election to accept or reject the vendor's title, in the event of the failure of the

vendors to cure objections within the period provided in said agreement, notice and memorandum of which objections have heretofore been given to you, you are hereby advised and notified that inasmuch as the objections to the title as noted have not been cured and I am required to elect to either accept or reject vendors' title as it now stands, within the period of sixty (60) days after the delivery of memorandum of such objections, I have elected to reject the vendors' title to said property as it now stands, and do hereby so reject the same, this being my notice thereof to you, as provided for in said agreement."

Defendant's counsel take the position that under the will of Bertha Honore Palmer, the powers of plaintiffs as trustees to sell the land were discretionary, and could not be delegated; that they could not in advance of any specific, determined contract in contemplation, escape ultimate exercise by them of an immediate discretion; that the instant contract left undetermined the purchaser, the amount of cash payment, the time or rate of payment of the balance of the purchase price, the taxes to be assumed and the amount of the release bonus, and would have to be executed by the trustees themselves; that never having been done, the contract is null and void.

In support of his contention defendant relies chiefly upon the case of Coleman v. Connolly, 242 Ill. 574, and Stein v. McKinney, 313 Ill. 84. We think neither of these cases is in point. In the Coleman case, supra, the executrix and trustee in a letter written by her to one Callan, appointed him her general agent and attorney to transact all her business in connection with the settlement of her father's estate, and authorized him to sell certain real estate, including the lots in controversy. It is very apparent that no such powers could be delegated by the trustee. The Stein case, supra, was a bill for specific performance brought upon a contract signed by an alleged agent of the defendant. The defendant denied the authority of the alleged agent to execute the contract. The court found the alleged agent did not have authority to execute the contract. The question of delegating the exercise of personal discretion was not involved.

The general rule applicable to a case of this nature is, that a trustee of an express trust, invested with powers, the execution of which calls for the exercise of discretion and judgment on the part of the trustee, cannot delegate such power to anyone, and hence the performance of an act requiring the exercise of discretion, must be done by the trustee himself, and cannot be delegated to an agent. The reason for the rule lies in the fact that the grantor who creates a trust and invests the trustee with powers, calling for the exercise of discretion on the part of the trustee in their execution, selects the trustee by reason of his confidence in the integrity and good judgment of the trustee, and when the trustee accepts the trust, he does so with the implied understanding that he will discharge the duties incumbent upon him, by reason of the trust, according to his own best judgment, and hence, unless the grantor expressly provides that the trustee may delegate the powers conferred, he cannot do so. However, ministerial duties connected with the exercise of the functions of a trustee may be performed by an agent (Gillespie v. Smith, 29 Ill. 473, 481; Spangler v. Kuhn, 212 Ill. 186.)

The question, therefore, to be determined is whether the execution of the contract in the instant case was ministerial. Kaim v. Lindley, 30 Atl. 1063, was a bill brought by a vendee against the vendors for specific performance of a contract to convey lands, signed by an agent. The defendant trustee invoked the rule that a power invoking the exercise of personal discretion and judgment could not be delegated. The contract, however, was sustained, and the court said, p. 1074:

"If the trustee * * * actually exercises the discretion and judgment * * * and arrives at a conclusion, he may delegate to another the mere ministerial duty of carrying out that judgment. * * * 'When the trustee has resolved in his own mind in what manner to exercise his discretion, he cannot be said to delegate any part of the confidence if he merely execute the deed by attorney or signify his will by proxy.' The trustee must act at times through

attorneys or agents, and, if he determines in his own mind how to exercise the discretion, and appoints agents or instruments to carry out his determination, he cannot be said to delegate the trust, even though deeds or other instruments are signed by attorneys in his name. So, if he gives instructions to his attorneys and agents how to act, it cannot be said to be a delegation of the trust."

In Smith v. Swan, 22 S. W. 247, 248, it was said:

"Where the trustee himself agrees upon and arranges the sale, and settles all preliminaries involving the exercise of discretion, he may by agent perform the act of executing and delivering the deed."

It is true the plaintiffs did not select defendant as the purchaser of the land, but it is clear that the trustees actually exercised their discretion, arrived at a conclusion and directed Hollis to sell the land to anyone upon the payment of \$60 an acre, one quarter down and one quarter each year thereafter, title to remain in the plaintiffs until one-half of the purchase price was paid, the contract to be upon a standard form adopted by the trustees, and that Hollis carried out the directions of the trustees and the contract in question was executed. Applying the principles announced to the facts in the instant case, we are of the opinion that the execution of the contract was a ministerial duty, performed by Hollis as the agent of the trustees after they had exercised their discretion with respect to the sale of the land and had fixed the price and terms of sale.

It is finally contended that the abstract of title furnished by plaintiffs does not show a good and merchantable title in plaintiffs. An abstract of title is a summary of the facts relied on as evidence of title, containing a note of all conveyances, transfers or other facts relied on as evidences of the claimant's title, together with all such facts appearing of record as may impair the title. (Heinzen v. Lamb, 117 Ill. 549; Geithman v. Eichler, 265 Id. 579.) The contract in the instant case provided that the plaintiffs give defendant an abstract of title showing title in them as trustees and in case material

defects be found in their title and not cured within sixty days, the contract shall at the option of the defendant become null and void. Both parties have construed this provision of the contract to mean a merchantable title. In order that a title to real estate be merchantable it must be good beyond a reasonable doubt, and this must appear from the abstract. It must be such a title as will not detract from the salability of the land, or depreciate its value on the market, or expose the vendee to possible litigation or to the danger of being defeated in an action concerning it. (Enox v. Despain, 156 Ill. App. 134; Brown v. Cannon, 5 Ill. 174; Eggers v. Busch, 154 Ill. 604.) A purchaser has a right to be reasonably sure that no flaw will come up to disturb its merchantable value. (Close v. Stuyvesant, 132 Ill. 697; Firebaugh v. Wittenberg, 309 Id. 536.) But while a purchaser cannot be compelled to take a doubtful title, he will not be permitted to object to the title on account of the bare possibility that it will prove defective. He may, of course, contract for a perfect paper title and may refuse to accept any other, but all the facts upon which title depends are not of record and are not shown by abstracts, nor is it implied that the abstracts show matters not of record or all the facts and circumstances connected with the conveyances which might affect the title. (Atterbery v. Blair, 244 Ill. 363, 368-369; Bedinger v. Ray, 323 Id. 187, 191.) An abstract, in order to show a merchantable title, is not required to show a perfect chain from the government down. (Lamotte v. Steidinger, 266 Ill. 600, 606.) If it were necessary, in order to establish a good title, that an abstract show a perfect paper title, without default, defect or omission, although cured by existing facts or lapse of time, land could rarely, if ever, be sold. (Fime Savings and Tr. Co. v. Knapp, 313 Ill. 377, 389.)

The trial court found that the abstract was free from material defects and that the title of the plaintiffs was merchantable.

In this court seven objections are raised to the title designated in the briefs as Witmer's objections 2, 3, 5, 6, 8, 11 and 15. And the question here is: Were the defects objected to sufficient to excuse the performance of the contract by the defendant?

Objection 2 is that in the chain of title are two conveyances dated March 8, 1921, from the "Board of Education of Florida," bearing the seal "Florida State Land Office," and signed by "all of the trustees," the other dated May 14, 1903, from "Board of Education of the State of Florida," bearing the seal of "Department of Agriculture of the State of Florida," and signed by "all members of the board." The objection is that the conveyances were insufficient for the reason that those organizations did not exist at the time the conveyances were made, and that it should be shown from what source the State Board of Education obtained title. We do not think that a valid objection. (See sections 754, 755, 5693 and 5695, Compiled General Laws of Florida of 1927, and Federal Statutes, ch. 75 of the Acts of Congress March 3, 1845, and State ex rel. Kittel v. Jennings, 35 So. 936, 944.)

Objection 3 is that in the chain of title appears a conveyance dated June 19, 1893, filed July 27, 1895, from one Riches and wife to Edward Records and Joseph M. Lord. February 19, 1896, Records assigned all his interest in the lands to David M. Ripley in trust to be sold and the proceeds to be turned over to his creditors. From an examination of the abstract it does not appear that the assignment was accompanied by an oath in writing of the assignor reciting his intention to assign all his property. February 21, 1897, a foreclosure proceeding was filed against Riches and others. The objection raised was that the abstract did not show that Ripley was a party to the foreclosure proceeding. There is no merit to this objection. Section 6753, Compiled General Laws of Florida, 1927, provides that every assignment for the benefit of creditors

shall be accompanied by an oath in writing of the assignor reciting his intention to assign all his property, and section 6754 provides that the deed of assignment and the oath of the assignor shall both be recorded. In Williams v. Crocker, 13 So. 52, it was held that an assignment which is not accompanied by a recorded oath is not effective as an assignment. The instrument not having resulted in an assignment Ripley had no interest in the property.

Objection 5. Letters patent, dated October 4, 1910, filed January 19, 1916, were issued by the State of Florida to Sarasota-Venice Company, and a deed was executed by that company, dated June 20, 1921, and filed August 22, 1921, conveying the premises to the plaintiffs as trustees under the last will and testament of Bertha Honore Palmer, deceased. Such letters patent and deed appear in the chain of title. It is claimed that the abstract of title does not show a compliance with the laws of Florida relative to the payment of fees to the State and the payment for stock issued by the corporation which requires that an affidavit of the treasurer be filed with the secretary of state showing that ten per cent of the capital stock of the company has been paid; that until the statute is complied with, the stockholders are considered partners and quitclaim deeds were necessary from the partners. The statutes referred to are sections 5931 and 5935 of the Compiled General Laws of Florida, 1927. It appears from the evidence that the affidavit required by the statute had been filed, but it had not been placed on record with the Circuit Court of Sarasota County, Florida; and that a certified copy of the affidavit might be secured and recorded. However that might be, the stockholders had no interest in the real estate after the execution of the deed by which the corporation conveyed the title to the plaintiffs. (Lincoln Park Chap. R. & M. v. Swatek, 204 Ill. 228; Shahnell v. Consolidated Ice Machine Co., 138 Id. 67.

Objection 6. March 15, 1910, a warranty deed executed by West Coast Naval Stores Co., a corporation, conveying the premises to The Florida Development Co., a corporation, was filed, signed by the grantor by Kendall F. Crocker, described as its treasurer and chief executive officer, bearing no corporate seal. June 7, 1910, by quitclaim deed The Florida Development Co., a corporation, conveyed the premises to J. H. Lord. This deed is signed by the grantor by Charles T. Crocker president. December 28, 1914, J. H. Lord, the grantee in that quitclaim deed, made an affidavit, shown in the abstract, that in 1910 he was a stockholder, director and vice president of West Coast Naval Stores Company, when the deed by that company was executed, and that Kendall F. Crocker was then by resolution of the directors the chief executive officer of West Coast Naval Stores Company; that that company conveyed to J. H. Lord; that both deeds were authorized by the directors of West Coast Naval Stores Company and directed to be made by Kendall F. Crocker; that on May 18, 1910, he was also a stockholder, director and vice president of The Florida Development Co., and Charles T. Crocker was its president and that the said West Coast Naval Stores Company by J. H. Lord, vice president, quitclaimed the title to the premises to plaintiffs. The objection is that J. H. Lord was the beneficiary of the involved transaction and his affidavit was not proper to clear the situation which should be covered by a certified copy of the proceedings of the directors of the West Coast Naval Stores Company or by affidavit of a disinterested person, acquainted with the facts. This objection is not well taken because in 1935, the State of Florida enacted a statute, section 5695 of the Compiled General Laws of Florida, 1927, which provides:

"Whenever any * * *, deed of conveyance has by the person or persons owning the land therein described been executed and delivered to any grantee or grantees and has been for a period of ten years or more before June 8, 1925, spread upon the deeds records of the county wherein the land therein described has been

or was at the time situated and one or more subsequent conveyances of said land or parts thereof have been made, and such deed or conveyance or the public record thereof shows upon its face a clear and express purpose and intent of the person or persons executing the same to convey the said land by any such deed, the same shall be taken and held by all the courts of this State to have conveyed the fee simple title. * * *

Objection 8. It is claimed that a decree entered April 17, 1922, by the Circuit Court of Sarasota County, Florida, filed May 25, 1922, does not disclose what property was involved in the decree and that because of the multiplicity of the parties to the cause it is impossible to say how the property was affected by the decree without investigating the court records. From our examination of the abstract of title, it appears that on April 21, 1893, Edwin D. Clark, single, conveyed the premises to James W. Riches by warranty deed which deed was recorded in Deed Book "R", p. 743, and that on June 19, 1893, James W. Riches and Mioma A., his wife, by a warranty deed filed July 27, 1893, and recorded in Book "R", p. 744, conveyed the premises to Edward Records and Joseph M. Lord; that the decree entered April 17, 1922, sought to correct the difference in the spelling of the names and it was provided in said decree that said deed of April 21, 1893, and recorded in Deed Book "R", at p. 743, be reformed so as to show the name of the grantee to be "James W. Riches." There is no merit in this objection.

Objection 11. It is claimed that under the will of Bertha Honore Palmer, plaintiffs are restricted, in reinvesting the proceeds of the estate property, to "bonds, stocks, mortgages or other securities" and that the abstract of title discloses no right in plaintiffs under the will to purchase property of the character involved. There is no merit in this objection. The powers of investment of the trustees are contained in the 14th Article of the will, which, so far as it bears on the subject, is as follows: "(c) My trustees * * * shall have full power and authority at any time * * * to alter and change the investments from time to time in

their discretion, it being my intention that said trustees * * * in the management of said trust property and in the investment and reinvestment thereof, shall have as complete power to select, manage and control the same as I would have if I remained living." It is clear that the testatrix intended to give her trustees uncontrolled discretion in the management of the estate, with full power "to alter and change the investments." To "alter" means to change entirely or materially. (Funk & Wagnell's Dictionary.) Where trustees are given uncontrolled discretion in the management of the estate, with full power to alter and change the investments, they have power to change the form of the investments from one thing to another. (Merchants Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86.

Objection 15. By this objection it is contended that the abstract furnished the defendant did not run to the date it was tendered. The contract under which the defendant purchased the land in question was dated August 1, 1925, and it is silent as to the time the abstract of title was to be brought down to, its only requirement being that the abstract of title was to show good title in the plaintiffs at the date of the execution of the contract. The abstract furnished was brought down to August 10, 1925. The objection, therefore, is not well taken.

The abstract shows a complete and connected chain of title in plaintiffs and the title is merchantable, and we find no sufficient evidence in the record to justify the defendant in his refusal to perform the contract. The proper function of courts is to uphold contracts and enforce their performance as made, or give damages for a failure or refusal to perform them. (Voris v. McIver, 329 Ill. 340, 349; Firebaugh v. Wittenberg, 309 Id. 536, 540.) Finding no valid ground on which the purchaser ought to be permitted to excuse himself from the performance of his contract, the judgment of the Superior court will therefore be affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

35636
35637
35638

FRANCES LEE PORTER,
(complainant),
Appellee,

v.

WASHINGTON PORTER II,
et al.,
Defendants.

ON APPEAL OF WASHINGTON
PORTER II,
Appellant.

INTERLOCUTORY
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

264 I.A. 623'

MR. JUSTICE EDWARDS DELIVERED THE OPINION OF THE COURT.

Injunctions pendente lite were issued, after notice to defendants, upon the bill and amendments filed by the complainant, Frances Lee Porter, against Washington Porter II, Diamond Match Company, National Biscuit Company, Continental Illinois Bank and Trust Company, J. A. Lowell Blake, Howland G. Davis, George B. Harris, William Sheppen Davis, Edward S. Blayden, Lawrence Howe, J. Edwin Quinsberry and Jose G. Harris, a copartnership, trading as Blake Brothers & Co., restraining Washington Porter II, from transferring or disposing of the property belonging to complainant and directing him to surrender to and deposit with the Continental Illinois Bank and Trust Company certain certificates of stock. The restraining order appealed from in cause No. 35636 was entered August 26, 1931. The restraining order appealed from in cause No. 35637 was entered August 28, 1931, and in case No. 35638 the order was entered September 13, 1931. The appeals were consolidated for a hearing. To reverse these injunctions Washington Porter II prosecutes these appeals.

August 26, 1931, appellee filed her verified bill in which she alleged that appellant is her son; that her husband died in June, 1922; that shortly after the death of her husband her son came to her and suggested that he handle all her business affairs; that the affairs involved investments and the handling of properties and moneys that the appellee had received by gift and inheritance from her mother, and also of properties received by gift and will from her husband; that having implicit trust and confidence in the ability and integrity of her son she acceded to the suggestion and that from said time until shortly before the filing of the bill appellant managed and handled her property and affairs and advised her in connection with all investments and in all matters of business, and that she relied solely upon his advice, assistance and management, and trusted him with all matters, and that in the course of such dealings she entrusted him with checks and stock certificates signed in blank, bonds and other papers; that he also secured her signature to deeds of conveyance of various parcels of real estate and to various certificates of stock belonging to her, and to checks and other papers under the following circumstances; that he came to her in a great hurry while she was engaged in her household duties and presented a number of papers for her signature, without stating what they were or what they were intended to accomplish; that they were unimportant and that he needed them signed at once only as a matter of detail; that he was in a great hurry; that she demurred to signing them without knowing what they were and without reading them, but he reassured her and gave her his word of honor that they were unimportant papers and that he needed them signed for certain informal matters, and that he would bring them back to her and give her a chance to read them over; that she relied fully and completely on him, and

August 28, 1931, appeared in the New York Times

which also alleged that the company was not a corporation

in fact, but merely a trust of the assets of the company

and that the company was not a corporation in fact

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because of his repeated statements that he was in a great hurry, signed these papers and delivered them to him without reading them and without knowing what she signed, and that at no time thereafter did he bring to her any of the papers she had signed or give her any information concerning them, despite her frequent requests in that regard; that she did not discover until a few days before the filing of the bill that the papers she had signed included quitclaim deeds covering certain real estate, assignments of certificates of deposit in blank covering 363 shares of stock of the Diamond Match Company, 100 shares National Biscuit Company; 550 shares of Continental Illinois Bank & Trust Company and a check which the defendant filled in for the sum of \$20,000. The prayer of the bill is that the quitclaim deeds referred to be declared void; that an injunction issue against the appellant enjoining him from transferring or disposing of any of the property referred to in the bill or heretofore belonging to appellee and transferred to him and outstanding in his name; that an injunction issue against the Diamond Match Company, Continental Illinois Bank and Trust Company, National Biscuit Company, and the members of the firm of Blake Brothers & Company, enjoining them from transferring the shares of stock described in the bill; and for an accounting and other relief.

August 26, 1931, the chancellor entered an order restraining the appellant from assigning or disposing of any of the property belonging to appellee transferred or assigned to him and then outstanding in his name, upon the appellee filing a bond in the sum of \$10,000. August 28, 1931, the chancellor entered an order directing the appellant to surrender to and deposit with the Continental Illinois Bank and Trust Company the certificates of stock issued by the Diamond Match Company and National Biscuit Company, together with dividends received by him, said certificates

of stock and dividends to be held by the Continental Illinois Bank and Trust Company pending the final determination of the rights of the parties thereto, and directed the Diamond Match Company and the National Biscuit Company, respectively, to pay any and all dividends declared on said stock to said Continental Illinois Bank and Trust Company, and that said Trust Company also held all dividends payable on account of 350 shares of stock issued by the Continental Illinois Bank and Trust Company formerly belonging to appellee then standing in the name of appellant, pending the final determination of the rights of the parties thereto.

September 11, 1931, appellee filed amendments to her bill in which she alleged in substance that she owns 406 shares of Electric Bond & Share Company; that the certificates of stock representing said shares of stock were assigned by her to appellant under circumstances similar to those recited in the bill; that after the assignment of said stock by her, appellant procured the issuance to himself of certificates of stock of said Electric Bond & Share Company and did on August 24, 1931, procure the sale of said stock through Blake Brothers & Company, and that the proceeds of said sale are held by Blake Brothers & Company for his account; that she also owns a large number of shares of the common capital stock of the Commonwealth Edison Company, all of which were formerly represented by certificates of stock standing in her own name; that the appellant procured the assignment to himself of said stock precisely as set forth in her bill and procured the issuance of new certificates representing 273 shares of said stock to himself, and on August 21, 1931, procured the sale of 75 shares of said stock by Blake Brothers & Company, the proceeds of which are held by said Blake Brothers & Company for the account of appellant; that she also owns 116 shares of the preferred stock of National Carbon Company, formerly represented by certificates of stock standing in her name, and that the

appellant likewise procured the assignment of said stock under circumstances as set forth in the bill, and procured the issuance to himself of new certificates of stock representing 116 shares of the preferred stock of National Carbon Company and that the said stock is now held by Blake Brothers & Company.

September 12, 1931, the chancellor entered an order restraining the copartnership of Blake Brothers & Company from transferring, assigning or delivering any of the moneys, certificates of stock or other property that they now hold for or on behalf of the appellant, which formerly stood in the name of appellee, and from delivering any moneys which are the proceeds of the sale of 408 shares of the capital stock of the Electric Bond & Share Company, 73 shares of stock of the Commonwealth Edison Company, 116 shares of preferred stock of the National Carbon Company, and restraining the Continental Illinois Bank and Trust Company from transferring or disposing of 200 shares of Commonwealth Edison Company, until the further order of the court; and the National Carbon Company was ordered to pay any and all dividends payable on account of said 116 shares of preferred stock to Blake Brothers & Company; and the Commonwealth Edison Company was directed to pay any and all dividends on account of the 200 shares of the common stock of said Company to Continental Illinois Bank and Trust Company, which dividends said Blake Brothers & Company and the Continental Illinois Bank and Trust Company were directed to hold pending the final determination of the rights of the parties.

Appellant raised no objection to the original injunction which restrained him from transferring the property in dispute. His position is that the injunctions of August 28 and September 12, 1931, are mandatory, and ought not to be issued until a final hearing. In considering whether the injunctions were properly issued the bill, and the amendments thereto, must be taken as true so far as the facts

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Revised on October 11, 1961, at Washington

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For more information, contact the author at the address below.

It is noted that the above information was obtained from the records of the Department of the Interior, Bureau of Land Management, and is not intended to be a complete or exhaustive list of all the land in the State of Alaska.

UNITED STATES DEPARTMENT OF JUSTICE

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5. The following information was obtained from the records of the United States Department of Justice, Bureau of Prisons, for the year 1964:

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alleged are well pleaded. The bill alleges that a fiduciary relationship existed between the complainant and her son the defendant, and that by reason of the fraud practiced by the defendant he obtained from the complainant stocks of great value, which he has converted to his own use. Under such a state of facts it has repeatedly been held that the rule applicable to this class of appeals is whether the chancellor improperly exercised the discretionary power invested in him in issuing these injunctions. In other words, an order granting a preliminary injunction will not be reversed unless it clearly appears that the court has exercised the discretion vested in it in a wholly wrong conception of the facts or the law of the case, or that the granting of the injunction is contrary to some rule of equity or the result of improvident exercise of discretion (Mutual Oil Co. v. Empire Petroleum Co., 5 Fed. (2d) 500), and the propriety of his action must be considered from the standpoint of the chancellor. In City of Newton v. Lewis, 79 Fed. 715, 718, it was said:

"The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irreparable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is granted."

The purpose of these preliminary injunctions was to preserve the status of the parties and to prevent further or impending injury until upon a final hearing the court could determine the merits of the controversy and grant full relief. In Rago v. Village of Melrose Park, 161 Ill. App. 10, it was said that injunctions pendente lite will be granted "if it appears that less harm from this course will result to the enjoined party if he should be finally victorious than would accrue to the complainant from the absence of the injunction

if he were the winning party." (See also Fitchwick v. Lewis, 258 Ill. App. 402; Kuhl v. Clark, 261 Ill. App. 491.) In Toledo, A. & N. E. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 741, speaking through Mr. Justice Taft, it was said:

"Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits."

In The People v. Standidge, 333 Ill. 361, 365, the court said: "An interlocutory injunction is merely provisional in its nature * * *. Its object is to preserve the subject in controversy, * * *". The orders in causes Nos. 35637 and 35638 had the effect merely to hold the matters in statu quo until the court heard the cause on the merits. A court of equity has the power to issue such an injunction where the right is clear and the relative inconvenience bears strongly in complainant's favor and the acts complained of are wilful and fraudulent and without any pretense of right. (32 Corpus Juris 24, sec. 7; Bondy v. Samuels, 333 Ill. 535, 536; Leffis v. Leffis, 235 Ill. App. 478; Natural Oil Co. v. Empire Petroleum Co., 5 Fed (2d) 500.)

In the instant case we are of the opinion the balance of convenience is with the appellee. She shows by her bill that her property was obtained by fraud and that a fiduciary relation existed between her and the appellant and if she is successful will be entitled to a permanent injunction. (Penkala v. Tomosky, 317 Ill. 356, 360.)

Counsel for appellant conceded in his oral argument that the Uniform Stock Transfer Act, ch. 32, par. 235, Cahill's Rev. Stats. of Illinois, 1931, p. 770, authorizes the court to impound the certificates, but contends that the chancellor had no power to direct that the certificates be surrendered to and deposited with, and that the

It is now the winning party." (See also Chicago v. Board of Education, 332 U.S. 183, 68 S.Ct. 176, 82 L.Ed. 154 (1948).) In Chicago v. Board of Education, 332 U.S. 183, 68 S.Ct. 176, 82 L.Ed. 154 (1948), the Court held that the Board's action was unconstitutional.

However, this case was distinguished by the Court in Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 267, 81 L.Ed. 619 (1947). In Everson, the Court held that the Board's action was constitutional because it was a general law of public safety and not a law of special benefit to a particular group.

In Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 267, 81 L.Ed. 619 (1947), the Court held that the Board's action was constitutional because it was a general law of public safety and not a law of special benefit to a particular group.

The action in Everson was held to be constitutional because it was a general law of public safety and not a law of special benefit to a particular group.

It is now the winning party." (See also Chicago v. Board of Education, 332 U.S. 183, 68 S.Ct. 176, 82 L.Ed. 154 (1948).) In Chicago v. Board of Education, 332 U.S. 183, 68 S.Ct. 176, 82 L.Ed. 154 (1948), the Court held that the Board's action was unconstitutional.

However, this case was distinguished by the Court in Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 267, 81 L.Ed. 619 (1947). In Everson, the Court held that the Board's action was constitutional because it was a general law of public safety and not a law of special benefit to a particular group.

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It is now the winning party." (See also Chicago v. Board of Education, 332 U.S. 183, 68 S.Ct. 176, 82 L.Ed. 154 (1948).) In Chicago v. Board of Education, 332 U.S. 183, 68 S.Ct. 176, 82 L.Ed. 154 (1948), the Court held that the Board's action was unconstitutional.

dividends thereafter accruing be paid to the Continental Illinois Bank and Trust Company and Blake Brothers & Company; that this was tantamount to the appointment of a receiver. The only power given to the Continental Illinois Bank and Trust Company and Blake Brothers & Company was to hold the certificates and receive and hold the dividends until the further order of the court. This order was not in effect the same as the appointment of a receiver. (Metz et al. v. Brodfuscher et al., 196 Ill. App. 587.) Its effect was to make the Continental Illinois Bank and Trust Company and Blake Brothers & Company custodians of the certificates and the funds and the chancellor had the power to make such an order. (Ramsay v. Nichols, 73 Ill. App. 643; B. & O. N. R. Co. v. Gaultier, 168 Ill. 233; Mariner v. Ingraham, 285 Ill. 103.)

The next objection to the order of August 28, 1931, is that the court had no power to order the appellant to surrender dividends paid to him prior to the filing of the bill. There is no claim by appellee that the appellant was ordered to surrender such dividends, and as we read the order we are of the opinion that it had reference only to the dividends declared after the entry of the order.

Under the circumstances in the instant case we cannot say the discretion of the chancellor was improperly exercised. Accordingly the orders of the Superior court are affirmed.

AFFIRMED.

Gridley, P. J., and Eganlan, J., concur.

35637

FRANCES LEE PORTER,
(Complainant),
Appellee.

v.

WASHINGTON PORTER II,
et al.,
Defendants.

ON APPEAL OF WASHINGTON
PORTER II,
Appellant.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT,
COOK COUNTY.

264 I.A. 623²

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated with appeal No. 38636,
and the order of the Superior court in that case has this day
been affirmed.

For the reasons stated in the opinion filed in that
case the interlocutory order entered by the Superior court on
August 28, 1931, herein appealed from is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

Journal of Interpersonal Violence 28(12)

35638

FRANCIS LEE PORTER,
(complainant),
Appellee,

v.

WASHINGTON PORTER II,
et al.,
Defendants.

ON APPEAL OF WASHINGTON
PORTER II,
Appellant.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT, COOK
COUNTY.

264 I.A. 623²

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated with appeal No. 35636,
and the order of the Superior court in that case has this day
been affirmed.

For the reasons set forth in the opinion filed in
that case the interlocutory order entered by the Superior court
on September 12, 1931, herein appealed from is affirmed.

AFFIRMED.

Gridley, F. J., and Scanlan, J., concur.

1913

RECEIVED THE SECRETARY OF THE ARMY
WASHINGTON, D. C.

ADJUTANT GENERAL'S OFFICE
WASHINGTON, D. C.

OFFICE OF THE ADJUTANT GENERAL
WASHINGTON, D. C.

RECEIVED THE SECRETARY OF THE ARMY
WASHINGTON, D. C.

38414 038

TO THE SECRETARY OF THE ARMY, WASHINGTON, D. C.

THIS CASE WAS RECEIVED FROM THE
AND THE OFFICE OF THE ADJUTANT GENERAL IS
YOUR OFFICE.

THE ADJUTANT GENERAL'S OFFICE IS
THE ADJUTANT GENERAL'S OFFICE IS
THE ADJUTANT GENERAL'S OFFICE IS

ADJUTANT GENERAL, WASHINGTON, D. C.

34900

DENNIS J. FINN,
Defendant in Error,

v.

MARTIN P. FRAIN,
Plaintiff in Error.

39 7
ERROR TO CIRCUIT

COURT OF COOK COUNTY.

264 I.A. 623⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, Dennis J. Finn, obtained a judgment by confession in the sum of \$3,040 for rent alleged to be due, under the terms of a written lease, for the months of June to December, 1927, and attorney's fees of \$240. Subsequently the defendant was given leave to plead to the declaration, the judgment by confession to stand as security. There was a trial before the court, with a jury, and a verdict returned finding the issues for the plaintiff and assessing his damages in the sum of \$2,400. Judgment was entered on the verdict and the defendant has sued out this writ of error.

In addition to a plea of the general issue the defendant filed a number of special pleas. The pertinent ones allege payment, accord and satisfaction as to the plaintiff's claim by the turning over to the plaintiff of certain tools, equipment and accounts receivable, and the surrender and cancellation of the lease. The defendant also filed a special plea of set-off for the return of \$3,600 deposited by him with the plaintiff under the terms of the lease.

On April 21, 1927, the plaintiff, as lessor, and the defendant, as lessee, executed a written lease which covered a garage at 446-452 East 111th Place, Chicago. The period of the lease was from May 1, 1927, to April 30, 1937. The rental was fixed

10000

WILLIAM E. WILSON,
Defendant in Error.

v.

MARTIN J. WILSON,
Plaintiff in Error.

IN SENATE

COMMITTEE ON JUDICIARY

Settled 1.4.1938

THE SENATE HAS ADVISED THE HOUSE BY THE FOLLOWING

The plaintiff, William E. Wilson, obtained a judgment by execution in the sum of \$2,500 for rent alleged to be due under the terms of a written lease, for the month of June 1937, and attorney's fees of \$100. Subsequently the defendant was given leave to show to the decision, the judgment by execution to stand as acquittal. There was a trial before the court, with a jury, and a verdict returned finding the lease for rent, with a jury, and a verdict returned finding the lease for rent.

The plaintiff and defendant his counsel on the 1st of July, 1937, was entered on the verdict and the defendant had paid out this sum of money. In addition to a plea of the general issue the defendant filed a number of special pleas. The plaintiff once again returned record and execution as to the plaintiff's claim by the running over to the plaintiff of certain items, equipment and accounts receivable, and the surrender and cancellation of the lease. The defendant also filed a special plea of set-off for the return of \$2,500 deposited by him with the plaintiff under the terms of the lease.

On April 21, 1937, the plaintiff, as lessee, and the

defendant, as lessee, executed a written lease which covers a garage at 410-422 West 11th Street, Chicago. The period of the lease was from May 1, 1937, to April 30, 1937. The rental was fixed

as follows:

"From May 1, 1927 to April 30, 1928 --- \$400.00 per month.
 From May 1, 1928 to April 30, 1929 --- \$450.00 per month.
 From May 1, 1929 to April 30, 1930 --- \$500.00 per month.
 From May 1, 1930 to April 30, 1932 --- \$550.00 per month.
 From May 1, 1932 to April 30, 1934 --- \$575.00 per month.
 From May 1, 1934 to April 30, 1937 --- \$600.00 per month."

Upon the execution of the lease, the defendant turned over to the plaintiff \$4,000, of which \$400 was to apply as rent for the month of June, 1927, a concession having been granted for the month of May, and the balance, \$3,600, was to be held by the plaintiff in accordance with the following provision of the lease: "It is understood and agreed that the lessee is to pay \$3,600.00 receipt of which is hereby acknowledged as a deposit to apply on the last six months rent of said lease. The lessor agrees to pay the lessee interest on said \$3600.00 of 6% payable semi-annually until said moneys are due on lease." The defendant went into possession of the premises and operated therein a garage. Business was poor and certain talks took place between the plaintiff and the defendant in which the question as to whether or not the defendant should continue to operate the business was discussed. The theory of fact of the defendant was that as a result of the talks the plaintiff suggested to the defendant that the latter turn the garage back to the plaintiff and the latter would operate it for his own account; that on January 1, 1928, the defendant surrendered possession of the premises to the plaintiff and also turned over to him tools, equipment and stock belonging to the defendant, at an agreed value of \$1,998.65, and also turned over to the plaintiff accounts receivable amounting to \$163.64 and also the good will of defendant's garage business, in full satisfaction of the plaintiff's claim for rent due to that date; that on that date the plaintiff accepted the surrender of the premises, took possession of the same, and placed his agent in charge of the

as follows:

From May 1, 1933 to April 30, 1934	--- \$375.00 per month.
From May 1, 1934 to April 30, 1935	--- \$375.00 per month.
From May 1, 1935 to April 30, 1936	--- \$375.00 per month.
From May 1, 1936 to April 30, 1937	--- \$375.00 per month.
From May 1, 1937 to April 30, 1938	--- \$375.00 per month.
From May 1, 1938 to April 30, 1939	--- \$375.00 per month.
From May 1, 1939 to April 30, 1940	--- \$375.00 per month.
From May 1, 1940 to April 30, 1941	--- \$375.00 per month.
From May 1, 1941 to April 30, 1942	--- \$375.00 per month.
From May 1, 1942 to April 30, 1943	--- \$375.00 per month.

Upon the execution of the lease, the defendant turned over to the plaintiff \$1,000, of which \$400 was to apply as rent for the month of June, 1937, a commission having been granted for the month of May, and the balance, \$600, was to be held by the plaintiff in accordance with the following provision of the lease: "It is understood and agreed that the lessee is to pay \$1,000.00 receipt of which is hereby acknowledged as a deposit in full for the first six months rent of said lease. The lessee agrees to pay the lessee interest on said \$1,000.00 of the periodic semi-annually until said money has been so leased." The defendant was then possession of the premises and operated therein a garage. Between the time and certain date took place between the plaintiff and the defendant in which the question as to whether or not the defendant should continue to operate the business was discussed. The theory of fact of the defendant was that as a result of the lease the plaintiff suggested to the defendant that the latter turn the garage back to the plaintiff and the latter would operate it for his own account; that on January 1, 1938, the defendant surrendered possession of the premises to the plaintiff and also turned over to the plaintiff accounts receivable amounting to \$168.64 and also the good will of defendant's garage business, in full satisfaction of the plaintiff's claim for rent due to that date; that on that date the plaintiff accepted the surrender of the premises took possession of the same, and placed his agent in charge of the

premises and the garage business and thereafter operated the business on the premises for his own account, paying the bills, collecting defendant's accounts receivable and retaining the receipts from the operation of the business, and that the plaintiff never thereafter demanded of the defendant rent for the premises, and that the defendant, on January 1, 1928, demanded the return of the \$3,600 which had been paid to the plaintiff by the defendant under the terms of the lease. The defendant's position, briefly stated, is that the lease terminated December 31, 1927; that the defendant satisfied in full the claim of the plaintiff for rent to that date, and that the defendant, under the terms of the lease, was entitled to the return of his deposit of \$3,600 plus interest at six per cent as provided for in the lease. The theory of fact of the plaintiff was that there was no agreement for a satisfaction of the claim for rent by the acceptance of the tools and equipment and defendant's accounts receivable, and that there was no agreement, express or implied, by which the defendant surrendered the lease and the plaintiff accepted the same; that the defendant abandoned the premises and therefore forfeited his right to the \$3,600, and that the lease was still in force and that the plaintiff was entitled to rent for the premises at the rate of \$400 per month for the months of July, August, September, October, November and December, 1927, under the terms of the lease.

The defendant contends that the verdict is against the manifest weight of the evidence. After a careful reading of the evidence in this case, we have reached the conclusion that this contention is a meritorious one. As the case may be tried again, we refrain from analyzing and commenting upon the particular facts and circumstances that have caused us to reach this conclusion. However, we feel impelled to say that, in our opinion, it would be highly inequitable to allow the verdict and judgment to stand.

The defendant complains that the trial court erred in giving to the jury, at the instance of the plaintiff, the following instruction: "Gentlemen of the Jury, you are to judge from the preponderance of the evidence whether the lessee Frain simply quit the business and premises without any real agreement and settlement with his landlord, in which case you will find the issues for the plaintiff and assess his damages according to the evidence; or whether Frain and Finn made a full settlement and express agreement as regards the ending of the lease, payment of rent, the disposal of the equipment and the \$3600 in the hands of the lessor. If the latter case, you will find the issues for the defendant and assess such damages upon his plea of set-off as you may find from the evidence to be due." This contention is a meritorious one. By this instruction the jury were told that in order to sustain his claim that the lease was surrendered the defendant must prove that there was a surrender by the express agreement of the parties. Such is not the law. An agreement to surrender may also be inferred from the conduct of the parties. (See Williams v. Vanderbilt, 146 Ill. 238, 246; McCormick v. Brennan, 224 Ill. App. 251, 256; Thompson v. Western Casket Co., 219 Ill. App. 184, 190; Fry v. Patridge, 73 Ill. 51, 52; Dilla v. Stobie, 31 Ill. 202, 205; Hector v. Hartford Deposit Co., 190 Ill. 320, 325.) This instruction is otherwise bad. The defendant complains that the court erred in giving instruction number five to the jury, given at the instance of the plaintiff. It reads as follows: "If the lessee abandons its leasehold, abandons his garage business and abandons possession of the premises, he thereby makes it necessary for the landlord within the time either to find a new tenant for the garage, or to find customers himself in order to lessen the loss for himself as well as for the lessee, who remains obligated on the lease. The law

makes it the duty of the landlord to rent the abandoned premises for as much as he can get and apply such rent to the credit of the lessee, and in the case of a garage the law commends the landlord for running the garage and applying the credit to the lessee." The defendant complains that this instruction is not applicable to the plaintiff's theory of fact and that it was highly prejudicial to the defendant. This contention is a meritorious one. The defendant also complains, and rightfully, that the conclusion of the instruction, aside from the fact that it was not warranted by any evidence, was highly suggestive and prejudicial to the defendant. The defendant also complains that the court erred in giving to the jury, at the instance of the plaintiff, instruction number 4. This contention is also a meritorious one, as the instruction requires the defendant to prove an agreement to cancel the lease.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

35165

EMERSON B. STODDARD,
Appellant,

v.

ST. MARY'S HOME FOR
CHILDREN, a Corporation,
LEO WOLF, ART INSTITUTE
OF CHICAGO, a Corporation,
ELIZABETH CATHERINE SCHOLZON
and ANNE MARIE SCHOLZON,
Children of J. G. SCHOLZON,
GREENEBAUM SONS BANK AND
TRUST COMPANY, a Corporation,
as Executor of the Will of
HARRIET M. SAWYNE, and as Trustee
for the Children of J. G.
SCHOLZON, CLARA MERRIMAN,
FRANK TODD and JENNIE FRISCH,
Appellees.

40 7
264 I.A. 623

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

From an order dismissing his bill for want of prosecution,
the complainant, Emerson B. Stoddard, has appealed.

The bill was filed October 11, 1926. It sought to have
set aside the will of Harriet M. Sawyer upon the ground that the
testatrix, at the time of the execution of the instrument, was not
of sound mind and memory. It alleged that the testatrix bequeathed
all of her estate as follows:

"First: She directed that her debts and funeral expenses
be paid.

Second: She gave and bequeathed to St. Mary's Home for
Children, 2822 Jackson Boulevard, Chicago, Illinois, the
sum of \$5000.00.

Third: She gave and bequeathed to Leo E. Wolf, 5002
Glenwood Avenue, Chicago, Illinois, the sum of \$500.00.

Fourth. She gave and bequeathed to the Art Institute of
Chicago, Illinois, all of her silverware.

Fifth: All of the rest and remainder of her estate was
by the said purported will devised and bequeathed to
Greenebaum Sons Bank & Trust Company in trust, to be by

the said bank held until the youngest of the children of J. G. Scholzon, of 410 Baker street, San Francisco, California, living at the time of the death of said Mariet M. Sawyer, shall reach the age of 25 years, whereupon the said trust estate and all accumulations shall be turned over in equal shares, share and share alike, to such children as shall be living at the time the said youngest child shall have so reached the age of twenty five years, as will more fully appear from said instrument upon proof thereof in evidence herein."

The bill alleges that the estate of the testatrix was then pending and undisposed of in the Probate court of Cook county. The following were made defendants: "St. Mary's Home for Children, a corporation, Leo Wolf, Art Institute of Chicago, a corporation, Elizabeth Catherine Scholzon and Anne Marie Scholzon, children of J. G. Scholzon, Greenebaum Sons Bank & Trust Company, a corporation, as executor of the said purported last will and Testament of Mariet M. Sawyer, and as Trustee for the children of J. G. Scholzon, Clara Merriman, Frank Podd and Jennie Frisch." On the date of the filing of the bill a summons was issued against all of the defendants named in the bill, but the only defendant served was the defendant "Greenebaum Sons Bank & Trust Company, a corporation, executor of the purported will of Mariet M. Sawyer and as Trustee for the children of J. G. Scholzon." That defendant was served on October 15, 1926. On the return of the sheriff appears the following endorsement: "The other defendants not served by direction of plaintiff's attorney." The defendant served filed its appearance on October 21, 1926, and its answer on November 7, 1926. The complainant never filed a replication to this answer. On March 18, 1930, the solicitors for the defendant served filed a written notice, which had been served upon the solicitors for the complainant on March 17, 1930, which stated that the solicitors for the said defendant would appear on March 18, 1930, and move that the cause be placed upon the trial calendar. No order was entered as to this motion. On May 7, 1930, upon motion of the solicitors for

the said defendant, the court entered an order that the complainant "shall serve all parties made defendant herein and place said cause at issue within sixty days." The complainant took no steps to comply with this order until December 15, 1930. On December 10, 1930, the Central Trust Company of Illinois, "successor by consolidation to The Bank of America, formerly named Greenebaum Sons Bank and Trust Company," by leave of court, due notice of the proceedings having been served upon the complainant, was granted leave to file its petition to dismiss the complainant's bill for want of prosecution, and on December 11, 1930, on motion of the defendant Greenebaum Sons Bank and Trust Company, the complainant was ruled to answer the petition within five days. The petition sets up, inter alia, "that summons was issued in said cause against all of said defendants, but that notwithstanding the fact that various of said defendants reside in the City of Chicago, said summons was not served upon any of said defendants except your petitioner, although four years have elapsed since the filing of the bill of complaint herein. Your petitioner further represents that on May 7, 1930, an order was entered herein upon the motion of your petitioner, directing that said complainant serve all parties made defendant herein and place said cause at issue within sixty (60) days from said date; that notwithstanding the entry of said order said complainant has failed to serve any of said defendants and has failed to place said cause at issue; Therefore your petitioner prays that an order be entered herein dismissing said cause." The complainant's answer to the petition sets up "that a summons was duly issued and delivered to the sheriff and that the defendants Elizabeth Catherine Scholson, Anne Marie Scholson, Clara Merriman, Frank Tod and Jennie Frisch are all nonresidents and could not be served with the said summons. That summons has now been issued and delivered to the sheriff for

service upon Art Institute of Chicago, St. Mary's Home for Children and Leo Wolf and publication has been ordered for service upon the nonresident defendants. That the said defendant is not entitled to have the said bill of complaint dismissed because of failure to serve the said defendants other than the said Greenbaum Sons Fink & Trust Company as such executor and trustee. That the complainant has now taken all steps to have the said cause put at issue, and that after the said order was entered herein to put the cause at issue, copies of the bill with notice of the suit were forwarded to the sheriff at San Francisco to be served upon defendants reported to be residing there but they could not be found and the said copies of the bill and notices were recently returned by the said sheriff." On December 15, 1930, the complainant caused to be issued an alias summons against the defendants St. Mary's Home for Children, Leo Wolf and Art Institute of Chicago. The first of these defendants was served on December 16, 1930; the second on December 22, 1930, and the third on December 23, 1930. These three defendants were residents of Chicago, Cook county, Illinois. On December 15, 1930, the complainant filed an affidavit of non-residence as to certain other defendants. On December 20 the defendant St. Mary's Home for Children filed its appearance, and also its answer to the bill, on December 22. The petition to dismiss the bill was set for hearing on January 5, 1931, and at that time the solicitor for St. Mary's Home for Children appeared in open court and joined in the motion to dismiss the bill.

The complainant contends that the chancellor erred in dismissing the bill for want of prosecution. After a careful consideration of the record in this case we have reached the conclusion that this contention is without merit. When the complainant filed the bill his solicitor instructed the sheriff to serve the summons upon the executor only, although three of the defendants, St. Mary's

Home for Children, a corporation, Leo Wolf and the Art Institute of Chicago, a corporation, were beneficiaries under the will and residents of Chicago. The executor promptly filed its answer to the bill but the complainant has never filed a replication to the same. From the date of the filing of the bill, October 11, 1926, to March 17, 1930, a period of three years, five months and six days, the complainant did nothing. Upon the last mentioned date he was notified to put the case upon the trial calendar, but still he did nothing. On May 7, 1930, the chancellor ordered him to serve all the defendants and to place the cause at issue within sixty days. On December 8, 1930, it appeared that the complainant had then done nothing in the way of carrying out the order of May 7. Within a few days after the petition was filed the three Chicago defendants who were beneficiaries under the will were served. Under the statute a bill to contest a will must be filed within one year after the probate of such will, "saving to infants or non compos mentis, the like period after the removal of their respective disabilities," and there is force in the contention of the defendants that it is the policy of the law of this state to encourage the early vesting of property interests, and that the spirit of the statute contemplates a speedy trial of a proceeding like the instant one. (See Lewark v. Lodd, 238 Ill. 30, 33.) In a proper case the court has the inherent power to dismiss a bill for want of prosecution quo sponte, and this power exists independently of any statute. (Yott v. Yott, 257 Ill. 419, 422; Epley v. Epley, 328 Ill. 582, 583.) The question to be determined in each case is whether the power vested in the court was properly exercised under all the circumstances of the case. (Epley v. Epley, supra, 585.) "It is the duty of a complainant to prosecute his suit with diligence and if there is unreasonable delay his bill ought to be dismissed." (Yott v. Yott, supra, 423.) "Each case must be judged by its own facts and cir-

cumstances." (Exley v. Exley, supra, 585. See also Sanitary District v. Chapin, 226 Ill. 499.) There the delay of the complainant in prosecuting his suit is unreasonable and unexcused the chancellor should dismiss his bill. In Sanitary District v. Chapin, supra, it was contended that the court could not dismiss the petition for failure to prosecute with due diligence when at the time of the motion to dismiss the petitioner was in court willing to prosecute, even though there had been unreasonable delay in the prosecution of the cause, but the court said (p. 502): "None of the cases cited go to the extent of allowing plaintiff to do nothing for several years and answer a motion to dismiss for want of prosecution by saying that he is now ready to proceed." In the instant case the complainant delayed serving certain important defendants for a period of four years, although he knew that such defendants were within the jurisdiction of the court. The fact that the solicitor for the complainant instructed the sheriff not to serve these defendants, and the further fact that the complainant made no attempt to summon them until four years after the filing of the bill and after steps had been taken to have the bill dismissed, indicate plainly that the complainant sought to delay, for an unreasonable time, the disposition of the case. That our courts will not countenance such conduct, see Exley v. City of Chicago, 295 Ill. 276, 282-3.

The complainant contends that the petition for dismissal was presented by the Central Trust Company and that said company was not a party to the suit and therefore the chancellor erred in entering the order to dismiss on the petition and motion of that company. We find no merit in this contention. The petition to dismiss recites that "now comes Central Trust Company of Illinois, successor by consolidation to The Bank of America, formerly named Greengbaum Sons Bank and Trust Company, one of the defendants

herein." The complainant did not demur or move to strike the petition, but was fit to answer the same. The statute (Hahill's Ill. Rev. St., 1931, ch. 122, par. 12) provides that the "consolidation of one corporation with another, shall not affect suits pending in which such corporation or corporations shall be parties; nor shall such changes affect causes of action, nor the rights of persons in any particular; nor shall suits brought against such corporation by its former name be abated for that cause." By virtue of this statute the Central Trust Company of Illinois became the real executor in the instant case and it could have been quickly substituted for Greenebaum Home Bank & Trust Company by an apt motion and could then have moved to dismiss the bill. The instant contention seems to be an afterthought. Had the complainant raised, in the lower court, the question he now seeks to interpose in this court, the pleadings could have been readily amended. The petition was, in effect, the petition of the executor and was so treated by the parties and by the chancellor. Equity is concerned with substance rather than with form. Moreover, the defendant St. Mary's Home for Children joined in the motion to dismiss. Indeed, the chancellor, under the state of the record, had the inherent power to dismiss the bill on his own motion.

After a careful consideration of the several contentions of the complainant, we have reached the conclusion that the order of the Superior court, dismissing complainant's bill for want of prosecution, should be affirmed, and it is so ordered.

ORDER, DATED JANUARY 5, 1931, DISMISSING
COMPLAINANT'S BILL FOR WANT OF PROSECUTION,
AFFIRMED.

Grisley, P. J., and Kerner, J., concur.

35180

JAMES J. MCGURK,
(Petitioner) Appellee,

v.

CARLOS AMES, ARCHIBALD J.
CAREY and EDWARD J. BENEMARK,
as Civil Service Commissioners
of the City of Chicago,
(Respondents) Appellants.

4 / 7
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

264 I.A. 624

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

James J. McGurk, appellee (hereinafter called the petitioner), filed a petition for the writ of certiorari. On February 10, 1930, the petitioner filed his aforesaid petition against the appellants (hereinafter called the respondents), the Civil Service Commission of the city of Chicago, to review an order of the Commission, entered February 13, 1924, discharging the petitioner from his position as patrolman of the police department of the said city upon certain charges filed against him. The court ordered the writ to issue and thereafter the return of the respondents was filed and at the same time they filed a motion to quash the writ. The trial court, upon a hearing, overruled the motion to quash the writ and on December 12, 1930, entered a judgment quashing the record of the Civil Service Commission. The respondents have appealed.

The following is the return of the respondents to the writ of certiorari:

"The respondents in the above cause, Carlos Ames, Archibald J. Carey and Edward J. Benemark, as the Civil Service Commissioners of the City of Chicago, for their return to the writ of certiorari issued herein, do allege, represent and certify to the court that the following is a true, full and complete statement of the facts of record itself pertaining to the trial and discharge of the petitioner James J. McGurk, as complained of in the petition herein, and as commanded by the writ to be returned to the court, to-wit:

First: That on January 31, 1924, charges against the petitioner James J. McGurk, were preferred by the Commissioner of Police of the City of Chicago, together with specifications of particular acts and conduct constituting the respective violations charged, which charges and specifications are herein-after fully set out as part of the record and return in this cause, and said charges and specifications were filed with the respondent, Civil Service Commission of Chicago.

Second: That the respondent caused to be issued upon said charges so preferred and filed before it a written form of notice directed to said petitioner James J. McGurk, commanding him to be and appear before the respondent in Room 612 at 10 o'clock A. M., to answer and defend against said charges; that a copy of such charges was made to accompany said notice; that said petitioner James J. McGurk in writing on the 7th day of February, 1924, was served with said notice and a copy of the notice and the charges aforesaid; that said notice issued by the respondent, the service thereof on the petitioner and his knowledge of the receipt thereof are fully sworn by the record and return herein.

Third: That to sustain the charges aforesaid, the respondent heard the sworn testimony of the witness who appeared pursuant to the subpoena duly issued or without subpoena, as shown by the record herein set out.

And thereupon the respondent caused its findings to be entered of record and signed by it as its order and decree in said cause; sustaining the said charges and ordering the removal of the petitioner James J. McGurk from his position in the Police Department of the City of Chicago; all of which appears by the record of said cause hereinafter set out as part of this record.

Fourth: That the following is a true, full and complete transcript of the record of said proceedings affecting this petitioner certified by the said Civil Service Commission of the City of Chicago:

Civil Service Commission
City of Chicago

Chicago, Jan. 31, 1924.

To Patrolman James J. McGurk, Traffic Division.

Sir:-
You are hereby notified that charges (copy of which is hereto attached) have been filed against you before the Civil Service Commission by the Superintendent of Police, under Section 12 of the Civil Service Act (Removals), and that the Commission has ordered that a hearing be had on said charge in Room 612 City Hall, on the 13th day of February, A. D. 1924, at 10 o'clock A. M., at which time and place you may appear and be heard in your defense, if you see fit.

By order of the Commission.

W. F. Fechringer,

Secretary.

Received a copy of the above notice and within charges this 7th day of February, A. D. 1924.

James J. McGurk.

Department of Police

Chicago, Jan. 31, 1924.

To the Civil Service Commission
of the City of Chicago:

I hereby make the following charges against James J. McGurk Rank patrolman Department of Police of the Traffic Division Precinct, in the classified service of the City of Chicago, and request that the same be investigated by the Civil Service Commission or by an officer or board appointed by said Commission, and that proper action be taken thereon, under Section 12 of the Civil Service Act and the rules of the Commission.

Charges.

In violation of the following paragraphs of Sec. 1, Rule 30, Rules and Regulations of the Department of Police, prescribed and in force Nov. 1, 1910.

1. Par. 16: Leaving precinct or station while on reserve duty or being absent from duty without permission.
2. Par. 12: Disobedience of orders.
3. Par. 13: Insultation or disrespect toward a superior officer.

Specifications.

1. In that on or about the 22d day of Jan. 1924, at about 7 A. M., Patrolman James J. McGurk called the Traffic Division by 'phone and advised that the heating plant of his home had broken down and that the water had frozen, and requested to be excused from duty so as to give this matter his attention, he was advised that he would be excused for one tour of duty., He failed to report for duty on the 23rd or up to the present time and has been absent from duty without permission from Jan. 23 to Jan. 31, 1924, both inclusive.

2. In that on Jan. 24, 1924, Sgt. Otto A. Pearson, Traffic Division, visited the officer at his home, 7700 S. May St., and notified the officer to report at the Traffic Division on the following day, this the said Patrolman James J. McGurk agreed to do but up to the present time has failed to comply with the orders of Sgt. Pearson. In that a further effort was made to see the said Patrolman James J. McGurk on Jan. 29, 1924, when Sgt. John Nugent, Traffic Division called at the said Patrolman's home, 7700 S. May St., at about 1 o'clock P. M., 3:34 P. M., and 6:30 P. M., on said date and found the said patrolman absent from his home on each visit.

3. In that on or about the 28th day of Jan. 1924, the said Patrolman James J. McGurk was ordered to report for duty at 11:45 P. M. of said date and that he disobeyed the orders received by him and failed to report for duty as ordered.

Approved as to form:

Carl Hjalma Lundquist,

Asst. Corporation Counsel.

WITNESSES

Name	Address
Capt. Patrick E. Hogan	Traffic Division
Sgt. Otto A. Pearson	"
Sgt. John Nugent	"
Sgt. David Flynn	"
Operator Herman Richstadt	"

Respectfully submitted,
/s/ Patrick E. Hogan
Capt. Comdg. Traffic
Division

Respectfully submitted,
(signature)

Morgan A. Collins
Superintendent of Police

IN THE MATTER OF CHARGES AGAINST James J. McGurk

FINDINGS AND DECISION

And now, the Civil Service Commission of the City of Chicago, having met in Room 412 City Hall on the 13th day of February, 1924 for the purpose of investigating the foregoing charges, proceeded to hear and did hear testimony of the witnesses, a record of which is preserved and on file in the office of the Commission.

And upon conclusion of all the evidence and argument, the Commission, being fully advised, finds that the following charges were filed against James J. McGurk in due form of law on the 31st day of January, 1924.

The Commission further finds that thereafter due notice was served upon the said James J. McGurk on the 7th day of February, 1924, by delivering a copy of said notice to the said James J. McGurk, which notice is in words and figures as follows:

CIVIL SERVICE COMMISSION
CITY OF CHICAGO

January 31, 1924

To: Patrolman James J. McGurk
Traffic Division

Sir:

You are hereby notified that charges (a copy of which is hereto attached) have been filed against you before the Civil Service Commission by Superintendent of Police, under Section 12 of the Civil Service Act (Removals), and that the Commission has ordered that a hearing be had on said charges in Room 412 City Hall, on the 13th day of February, 1924, at 10 o'clock a. m., at which time and place you may appear and be heard in your defense, if you see fit.

BY ORDER OF THE COMMISSION.

W. F. Wehringer
Secretary.

The Commission further finds that together with said notice a copy of the foregoing charges was duly served upon the said James J. McGurk five days prior to this investigation; that the said James J. McGurk in person at this hearing that he was present throughout and participated in the examination of witnesses; that all the witnesses were duly sworn, and testified.

The Commission further finds that the said James J. McGurk on the 31st day of January, 1924, was a patrolman in the Department of Police of the City of Chicago.

The Commission further finds that it has jurisdiction over the subject matter herein and of the person of the said James J.

1998

1990-1991

WILLIAM J. HARRIS
WILLIAM J. HARRIS

Journal of Management Inquiry 20(4) 409-424

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigations into the activities of the British Security Co-ordination Unit (BSCU) in the United States.

100-443886-100
ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 01-11-2001 BY 60322 UCBAW

1. The Commission has received information that the following persons have been identified as having been involved in the activities of the Communist Party, U.S.A., in the State of New York:

HOUSTON, TEXAS, APRIL 1950
 READING TO THE

1985-86 Yearling

100-443887-100

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group.

...and the ...

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— 2000 —

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Intelligence Service in the United States.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation.

TO: SAC, NEW YORK (100-100000) FROM: SAC, NEW YORK (100-100000) (P)
SUBJECT: [REDACTED] (P)

McGurk; and from a consideration of all the evidence before it, the Commission finds the said James J. McGurk guilty of the following:

Therefore, the Civil Service Commission finds the said James J. McGurk guilty of

Absence from duty without permission

Disobedience of orders and

Insubordination or disrespect towards a superior officer

as alleged in the foregoing charges, and by reason of such finding of guilt it is therefore

Ordered, That the said James J. McGurk be and he is hereby discharged from the position of patrolman Department of Police, and from the service of the City of Chicago.

Nicholas R. Finn

Edward J. Evans

John A. Pelka

CIVIL SERVICE COMMISSION

Chicago, 2/13/24

February 14, 1924

Hon. Morgan A. Collins,
Supt. of Police.

Dear Sir:

The Civil Service Commission, under date of February 13, 1924, found the following member of the Police Department guilty of the charges indicated and ordered that he be discharged from the service of the City of Chicago.

James J. McGurk, patrolman, Traffic Division.

1. Par. 16: Leaving precinct or station while on reserve duty.
2. Par. 12: Disobedience of orders
3. Par. 13: Insubordination or disrespect toward a superior officer.

BY ORDER OF THE COMMISSION:

Secretary.

WET T

CERTIFICATE

We, CARLOS ANNE, MARSHALL J. JARNEY and EDWARD J. BRENNAN, as Civil Service Commissioners constituting the Civil Service Commission of the City of Chicago, Illinois, pursuant to the writ of certiorari ordered by the Superior Court of Cook County, Illinois, and issued and served upon us, directing us so to do, do hereby return and certify that the foregoing is a true, full and complete record of the proceedings had in the matter of the trial or hearing upon written charges filed before the Commission against the petitioner James J. McGurk, including said charges, notice, hearing and order of dismissal of said James J. McGurk from his position as patrolman of the Police Department of the City of Chicago, Illinois, as the

said record appears on file in the offices of the Civil Service Commission of the City of Chicago.

IN WITNESS WHEREOF, we, as the Civil Service Commission of the City of Chicago, Illinois, and as individual members thereof, do hereby sign.

/s/ Carlos Ames
/s/ Archibald J. Carey
/s/ Edward J. Denmark
CIVIL SERVICE COMMISSIONERS OF THE
CITY OF CHICAGO."

The motion of the respondents to quash the writ of certiorari contains the following grounds in support of it:

"1. The return of the respondents filed herein shows on its face that said respondents in the matters complained of had jurisdiction of the person of the said petitioner, James J. McGurk and of the subject matter of said investigation set forth in said return.

2. Said return shows on its face that the finding made by said respondents was a finding in all respects legal and valid, based upon written charges, a hearing had thereon, participated in by petitioner and his counsel, and a finding of facts made from the evidence.

3. Said return shows on its face that said respondents proceeded in all things in accordance with the law in the matter of the hearing of the charges against the said James J. McGurk.

4. Said return shows on its face that the finding of the Civil Service Commission contains a recital of such facts as are necessary under the law to substantiate the charges, and to determine that jurisdictional cause for petitioner's dismissal existed.

5. Said return shows on the face such laches that said petitioner by his laches of more than six months in filing his petition, is estopped to question the legality of the proceedings of these respondents as set forth in said return.

6. Said return shows on its face that said petitioner has suffered no substantial injustice.

For above and divers other good and sufficient reasons appearing on the face of said return, these respondents pray that the writ of certiorari heretofore issued herein be quashed and that the petition of petitioner be dismissed at petitioner's costs."

The judgment of the Superior court contains the following:

"And the Court having heard the arguments of counsel and being fully advised does now overrule the motion of the respondents to quash the Writ and the Court thereupon sustained and the motion of the petitioner to quash the record as herein returned. The Court now finds that the Civil Service Commissioners, respondents herein, were without jurisdiction to order the discharge of the petitioner from his position as Patrolman, Department of Police and that therefore the record of the Commission should be quashed.

The Court further finds that petitioner has waived all

will receive approval on this in the vicinity of the 1952-1953
 termination of the 1952-1953.

100 Bureau Blvd.
 400 Fifth Avenue, New York, New York 10018
 In Western Hemisphere, call 212 679-1400

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 08-17-2009 BY 60322
AND NO FURTHER ACTION IS REQUIRED

Send everything to the old name of the company and to the new one.

Let us follow a simple method: let us

1. The first of the two main groups of the population of the Republic of Armenia is the Armenian population. It is the largest and the most numerous group, comprising about 80% of the total population. The Armenian population is concentrated in the central and southern parts of the Republic, particularly in the Yerevan region and the Aragatsotn region. The Armenian population is characterized by a high level of education and a high level of economic activity. The Armenian population is also characterized by a high level of social and cultural development. The Armenian population is the main force in the development of the Republic of Armenia.

1. This person should be the one who is in charge of the work of the committee.

1. The first of these is the fact that the majority of the population of the country is of African descent, and that the majority of the population of the country is of African descent, and that the majority of the population of the country is of African descent.

At this point, the following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land in question:

3. Half section after the first 1000 feet with
evidence of the change in the section is given the
designation, as follows: the section is designated
as follows: the section is designated as follows.

3. Civil Rights - The Civil Rights Act of 1964 is a landmark piece of legislation that prohibits discrimination on the basis of race, color, religion, sex, or national origin. It is a key component of the American civil rights movement.

THE ABOVE AND OTHERS ARE HEREBY ADVISED THAT THE
RECORDS OF THE BUREAU OF LAND MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR,
WILL BE AVAILABLE FOR EXAMINATION AND REPRODUCTION BY ANY PERSON
WHO REQUESTS THEM IN WRITING TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT,
WASHINGTON, D.C. 20250.

The interest of the present work consists in the following:

7. The above information was obtained from the records of the Department of the Interior, Bureau of Land Management, and is being furnished to you for your information.

The Court further stated that evidence was not needed to

right of action for back salary in consideration for his reinstatement. It is therefore ordered and adjudged by the Court that the record of the Civil Service Commission of the City of Chicago, as returned in this case discharging the petitioner from his position as Patrolman, Department of Police be and the same is hereby ordered by the Court."

While the ordering part of this judgment is practically meaningless and noneffective, nevertheless, both parties have seen fit to treat the order as one that overrules the motion of the respondents to quash the writ and that sustains the motion of the petitioner to quash the record of the Commission. In our view, whatever may have been the purpose of the judgment order, it should not be allowed to stand.

The respondents contend that the return of the Commission establishes that it had jurisdiction of the person of the petitioner and of the subject matter, that specific charges were filed against the petitioner and that he was duly served with notice of the time and place for hearing the charges, and that the record shows that there was evidence fairly tending to support the charges and that the Commission proceeded in due form of law, and that the trial court, under the return of the Commission, was without power to review the order of the Commission on the ground that the inferior tribunal wrongfully removed the petitioner from office. From the return, it is clear that this contention is a meritorious one. (See the late case of Carroll v. Houston, 341 Ill. 531.) The order of the Superior court is so indefensible that the petitioner makes but a feeble effort to defend it. He contends that no proper notice was served upon him as to the time and place of the hearing of the charges. There is not the slightest merit in this contention. The return shows that he was personally served with notice of the charges and that the Commission would have a hearing of the charges in Room 612, City Hall, on the 13th day of February, A. D. 1934, at 10 o'clock a.m. The petitioner, in his petition, admits that he received a notice of the charges and specifications and the time for the hearing of the same, and he further states "that on receiving the charges herein he was so shocked and

surprised, that he was unable and unprepared to answer the charges herein, that he was unable to appear and did not appear to answer the charges herein on February 13th, the day of the alleged hearing, and discharge of your petitioner." The petitioner further contends that the return to the writ does not show that the petitioner was present at the hearing of the said charges or that he was represented by counsel. There is no merit in this contention, as the record shows that the petitioner, after receiving notice of the charges and the time and place for hearing the same, voluntarily chose to be absent from the hearing. The last contention of the petitioner is that "the return made by the defendants the Civil Service Commission of the City of Chicago as a part of the record under the heading of Findings and Decision is of date February 13, 1934." From one part of the original record filed in this court it would appear that the Commission met to hear the charges on February 13, 1934, but that this was a mere clerical error clearly appeared even from the original record filed, but the petitioner, in a desperate effort to sustain the judgment of the Superior court, saw fit to take advantage of a plain clerical error. However, the respondents have caused to be filed in this court a supplemental record from which it appears that the Commission met to hear the charges on February 13, 1924.

The respondents contend that there is another reason why the judgment of the Superior court must be reversed: that the charges were filed on January 31, 1934, and the petitioner was discharged by an order of the Commission entered February 13, 1934; that no facts were asserted in the petition for certiorari ^{or proven on the hearing} ~~xxxxxxxxxxxx~~ to excuse the delay in filing the petition; that such delay constitutes laches and that the petitioner was therefore not entitled to the relief he sought. This contention is also a meritorious one. (See Carroll v. Houston, *supra*, p. 533.) The petitioner does not even attempt to answer this contention of the respondents.

...that he was unable to attend the hearing...
...and did not appear to answer the...
...the day of the alleged hearing, and...
...The petitioner further contends that...
...the petition is the only one that the petitioner has...
...of the hearing of the petition was...
...There is no doubt in fact that the...
...that the petitioner, after...
...and after the hearing, the...
...The last contention of the petitioner is that...
...return made by the...
...City of Chicago as a part of the...
...and...
...original record filed in this court is...
...not to have the changes...
...original record...
...of the petition...
...the original record, now...
...However, the...
...original record from which it appears...
...The respondent...
...the judgment of the...
...the petition...
...or proven on the hearing...
...the delay in filing the petition...
...that the petitioner was...
...Also he sought. This contention is also...
...The petitioner was not even...
...to answer this contention of the respondent.

In a final effort to sustain the judgment of the Superior court, the petitioner argues that the trial court was actuated by a high sense of justice in entering the judgment in question. It would appear from the judgment that the trial court entered it in consideration of the petitioner's waiving his right of action for back salary. Such waiver would, of course, be no warrant for the entry of the judgment in question.

The judgment of the Superior court of Cook county is reversed and the cause is remanded with directions to the trial court to quash the writ of certiorari issued in the cause and to dismiss the petition of the petitioner.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Kerner, J., concur.

in a third effort to obtain the Government of the Republic
 (1917) the petitioners have now and then been advised by
 a high officer of Justice to withdraw the petition in question. It
 would appear from the foregoing that the said officer is in
 possession of the petitioners' petition and that he wishes to
 keep it. Such action would be contrary to the wishes of the
 body of the petitioners in question.

The Government of the Republic of Cuba is
 advised that the same is in possession of the petition in the State
 and is in possession of the petition in the State and is
 in possession of the petition in the State and is in possession of the
 petition in the State and is in possession of the petition in the State.

Subject to the above, the petitioners are advised.

35161

JOHN O'CONNOR,
Appellee,

v.

CARLOS AMES, ARCHIBALD J.
CAREY and EDWARD J. DENEMARK,
as Civil Service Commissioners
of the City of Chicago,
Appellants.

4 2 7
APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

264 L.A. 624²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John O'Connor, appellee (hereinafter called the petitioner), filed a petition for the writ of certiorari. On December 3, 1930, the petitioner filed his aforesaid petition against the appellants (hereinafter called the respondents), the members of the Civil Service Commission of the city of Chicago, to review an order of the Commission, entered February 25, 1925, discharging the petitioner from his position as patrolman of the police department of the said city upon charges filed against him. The court ordered the writ to issue and thereon after the return of the respondents was filed and at the same time they filed a motion to quash the writ. The trial court, upon a hearing, overruled the motion to quash the writ, and on December 12, 1930, entered a judgment quashing the record of the Civil Service Commission. The respondents have appealed.

The following is the return of the respondents to the writ:

"The respondents in the above cause, Carlos Ames, Archibald J. Carey and Edward J. Denemark, as the Civil Service Commissioners of the City of Chicago, for their return to the writ of certiorari issued herein, do allege, represent and certify to the court that the following is a true, full and complete statement of the facts of record and the record itself pertaining to the trial and discharge of the petitioner John O'Connor, as complained of in the petition herein, and as commanded by the writ to be returned to the court, to-wit:

12121

JOHN O'CONNOR

Attorney

7

JOHN O'CONNOR, Respondent

vs.

JOHN O'CONNOR, Petitioner

at the City of Chicago.

Illinois.

JOHN O'CONNOR, Respondent

vs.

JOHN O'CONNOR, Petitioner

IN SENATE, JANUARY 12, 1890.

JOHN O'CONNOR, Respondent (hereinafter called the

petitioner), filed a petition for the writ of habeas corpus.

January 12, 1890, the petitioner filed his original petition

against the respondent (hereinafter called the respondent).

The members of the State Bar Association of the City of

Chicago, in order to bring to the attention of the respondent

the petition, filed a petition for the writ of habeas corpus

against the respondent of the State Bar Association of the City of

Chicago, filed a petition for the writ of habeas corpus

against the respondent of the State Bar Association of the City of

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against the respondent of the State Bar Association of the City of

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against the respondent of the State Bar Association of the City of

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against the respondent of the State Bar Association of the City of

Chicago, filed a petition for the writ of habeas corpus

against the respondent of the State Bar Association of the City of

First. That on February 4, 1925, charges against the petitioner John O'Connor, were preferred by the Commissioner of Police of the City of Chicago, together with specifications of particular acts and conduct constituting the respective violations charged, which charges and specifications are herein-after fully set out as part of the record and return in this cause, and said charges and specifications were filed with the respondent, Civil Service Commission of Chicago.

Second. That the respondent caused to be issued upon said charges so preferred and filed before it a written form of notice directed to said petitioner John O'Connor, commanding him to be and appear before the respondent in Room 612 at 10 o'clock A. M., to answer and defend against said charges; that a copy of such charges was made to accompany said notice; that said petitioner, John O'Connor, in writing on the 16th day of February, 1925, was served with said notice and a copy of the notice and the charges aforesaid; that said notice issued by the respondent, the service thereof on the petitioner and his knowledge of the receipt thereof are fully sworn by the record and return herein.

Third. That to sustain the charges aforesaid, the respondent heard the sworn testimony of the witnesses who appeared pursuant to the subpoena duly issued or without subpoena, as shown by the record herein set out.

And thereupon the respondent caused its findings to be entered of record and signed by it as its order and decree in said cause; sustaining the said charges and ordering the removal of the petitioner John O'Connor, from his position in the Police Department of the City of Chicago; all of which appears by the record of said cause hereinafter set out as part of this return.

Fourth. That the following is a true, full and complete transcript of the record of said proceedings affecting this petitioner, certified by the said Civil Service Commission of the City of Chicago:

Civil Service Commission
City of Chicago
Chicago, February 4th, 1925

To Patrolman John O'Connor, Star 1504
4319 Roscoe Street

Sir:-

You are hereby notified that charges (copy of which is hereto attached) have been filed against you before the Civil Service Commission by the Commissioner of Police, under Section 12 of the Civil Service Act (Removals), and that the Commission has ordered that a hearing be had on said charge in Room 612, City Hall, on the 25th day of February, A. D. 1925, at 10 o'clock A. M., at which time and place you may appear and be heard in your defense, if you see fit.

By order of the Commission.

W. F. Foehringer,
Secretary.

Received a copy of the above notice and within charges this
16th day of February, A. D. 1925.

/s/ John O'Connor.

DEPARTMENT OF POLICE

Chicago, Feby 4, 1925

To the CIVIL SERVICE COMMISSION
of the City of Chicago:

I hereby make the following charges against John O'Connor Rank Patrolman Department of Police of the 25th District Precinct, in the classified service of the City of Chicago, and request that the same be investigated by the Civil Service Commission or by an officer or board appointed by said Commission, and that proper action be taken thereon, under Section 12 of the Civil Service Act and the rules of the Commission.

Charges

Violation of the following sections of Rule 289--

Sec. 3 -- Conduct unbecoming a police officer or an employe of the Police Department

Sec. 12 -- Disorderly conduct.

SPECIFICATIONS

In that the said Patrolman John O'Connor did on the 3d day of February, 1925, at 5 P. M., while on duty, enter the home of Mrs. Marie Devine, 2340 West Lister Street, under the pretense of being sent to shoot a dog.

After getting into the house he forced his affections upon the said Mrs. Marie Devine by stating that he would like to have a nice girl like her. He then put his arm around her waist and kissed her on the cheek. She stated to the above officer that she was a married woman and in a delicate condition, but he still insisted to force himself upon her.

She told him that he had better go, as her mother would be home, but he, the officer, John O'Connor, said that he knew that her mother was working and that her husband was working also. He left the house at about 8:20 p. m., stating that he would return the next day.

Mrs. Marie Devine is a married woman, in a pregnant condition, and states that she at no time has ever seen Patrolman John O'Connor before.

Patrick J. Harding,
Captain Comdg., 25th District.

Witnesses

Name	Address
Capt. P. J. Harding	25th District
Sgt. Wm. R. Schultz	" "
Mrs. Marie Devine	" "
Mr. Charles Devine	2340 Lister Street

Respectfully submitted,
(Signature)

MORGAN A. COLLINS
Capt. of Police
Commissioner of Police

IN THE MATTER OF CHARGES AGAINST John O'Connor:

FINDINGS AND DECISION

And now, the Civil Service Commission of the City of Chicago, having met in Room 612 City Hall on the 25th day of February, 1925, for the purpose of investigating the foregoing charges, proceeded to hear and did hear testimony of the witnesses, a record of which is preserved and on file in the office of the Commission.

And upon conclusion of all the evidence and argument, the Commission, being fully advised, finds that the following charges were filed against John O'Connor in due form of law on the 25th day of February, 1925:

Sec. 3 Conduct unbecoming a police officer
or employe of the police department

Sec. 12 Disorderly conduct

The Commission further finds that thereafter due notice was served upon the said John O'Connor on the 16th day of February, 1925, by delivering a copy of said notice to the said John O'Connor, which notice is in words and figures as follows:

CIVIL SERVICE COMMISSION
CITY OF CHICAGO

Chicago, Feby 4, 1925

To: Patrolman John O'Connor, Star No. 1504
4319 Roscoe Street

Sir:

You are hereby notified that charges (a copy of which is hereto attached) have been filed against you before the Civil Service Commission by the Supt. of Police, under Section 12 of the Civil Service Act (Removal), and that the Commission has ordered that a hearing be had on said charges in Room 612 City Hall, on the 25th day of Feby, 1925, at 10 o'clock a.m., at which time and place you may appear and be heard in your defense, if you see fit.

BY ORDER OF THE COMMISSION.

W. P. Fechringer
Secretary.

The Commission further finds that together with said notice a copy of the foregoing charges was duly served upon the said John O'Connor five days prior to this investigation; that the said John O'Connor in person at this hearing and was represented by counsel that he and his counsel were present throughout and participated in the examination of witnesses; that all the witnesses were duly sworn, and testified.

The Commission further finds that the said John O'Connor on the 16th day of February, 1925, was a patrolman in the Department of Police of the City of Chicago.

The Commission further finds that it has jurisdiction over the subject matter herein and of the person of the said John O'Connor; and from a consideration of all the evidence before it, the Commission finds the said John O'Connor guilty of the following:

Conduct unbecoming a police officer or an employe
of the Police Department
Disorderly conduct

Wherefore, the Civil Service Commission finds the said
John O'Connor guilty of

Conduct unbecoming a police officer
or employe of the Police Department
and

Disorderly conduct

as alleged in the foregoing charges, and by reason of which
finding of guilt, it is, therefore,

Ordered, That the said John O'Connor be and he is hereby
discharged from the position of Patrolman, Department of Police,
and from the service of the City of Chicago.

Nicholas R. Finn

Edward J. Evans

John H. Pelka

CIVIL SERVICE COMMISSION

Chicago, February 25, 1925.

February 26, 1925

Hon. Morgan A. Collins,

Supt. of Police,

City of Chicago

Dear Sir:

The Commission under date of 25th instant found the following
member of the Police Department guilty of the charges indicated,
and ordered that he be discharged from the service of the City
of Chicago:

John O'Connor, patrolman, 25th district

Conduct unbecoming a police
officer;

Disorderly conduct

BY ORDER OF THE COMMISSION:

Secretary.

CERTIFICATE

We, Carlos Ames, Archibald J. Carey and Edward J. Benenmark,
as Civil Service Commissioners constituting the Civil Service
Commission of the City of Chicago, Illinois, pursuant to the
writ of certiorari ordered by the Superior Court of Cook County,
Illinois, and issued and served upon us, directing us so to do,
do hereby return and certify that the foregoing is a true, full
and complete record of the proceedings had in the matter of the
trial or hearing upon written charges filed before the Commission
against the petitioner John O'Connor, including said charges,
notice, hearing and order of dismissal of said John O'Connor,
from his position as patrolman, of the Police Department of the
City of Chicago, Illinois, as the said record appears on file
in the offices of the Civil Service Commission of the City of
Chicago.

IN WITNESS WHEREOF, we, as the Civil Service Commission of
the City of Chicago, Cook County, Illinois, and as individual

1. *Spiders* are the most common arachnids found in homes.
 2. *Scorpions* are found in warm, dry areas.
 3. *Centipedes* are found in damp, dark areas.

[illegible]

On the 1st of January 1900, the following was the result of the examination of the accounts of the various departments of the Government of India for the year 1899-1900.

1. Michael J. Ryan
 2. Robert J. Ryan
 3. John A. Ryan
 4. James A. Ryan

• 1987 •

331 33 7720767

100. Bureau of Prisons
101. Bureau of Prisons
102. Bureau of Prisons

1. The Commission has been informed that the following information was received from the Bureau of the Census, Washington, D.C., on 10/10/50:

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

IT GOES ON THE WALL WITH

1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

1991年12月

[illegible]

1994

[illegible]

members thereof, do hereby sign.

Charles Ames
A. J. Garey
Edward J. Denmark
CIVIL SERVICE COMMISSIONERS OF THE
CITY OF CHICAGO."

The motion of the respondents to quash the writ of certiorari contains the following grounds in support of the motion:

"1. The return of the respondents filed herein shows on its face that said respondent in the matters complained of had jurisdiction of the person of the said petitioner John O'Connor and of the subject matter of said investigation set forth in said return.

2. Said return shows on its face that the finding made by said respondents was a finding in all respects legal and valid, based upon written charges, a hearing had thereon, participated in by petitioner and his counsel, and a finding of facts made from the evidence.

3. Said return shows on its face that said respondents proceeded in all things in accordance with the law in the matter of the hearing of the charges made against the said John O'Connor.

4. Said return shows on its face that the finding of the Civil Service Commission contains a recital of such facts as are necessary under the law to substantiate the charges, and to determine that jurisdictional cause for petitioner's dismissal existed.

5. Said return shows on the face such laches that said petitioner by his laches of more than six months in filing his petition, is estopped to question the legality of the proceedings of these respondents as set forth in said return.

6. Said return shows on its face that said petitioner has suffered no substantial injustice.

For above and divers other good and sufficient reasons appearing on the face of said return, these respondents pray that the writ of certiorari heretofore issued herein be quashed and that the petition of petitioner be dismissed at petitioner's costs."

The judgment of the Superior court contains the following:

"And the Court having heard the arguments of counsel and being fully advised does now overrule the motion of the respondents to quash the Writ and the Court thereupon sustained and the motion of the petitioner to quash the record as herein returned. The Court now finds that the Civil Service Commissioners respondents herein, were without jurisdiction to order the discharge of the petitioner from his position as Patrolman, Department of Police and that therefore the record of the Commission should be quashed.

The Court further finds that petitioner has waived all right of action for back salary in consideration for his reinstatement. It is therefore ordered and adjudged by the Court that the record of the Civil Service Commission of the City of Chicago, as returned

* 2019-2020 * 2019-2020 *

[illegible]

Responsible to give and accept of assignments and to deliver on

contains the following procedure in support of the subject:

1. The purpose of this memorandum is to provide information to the Bureau of the Federal Bureau of Investigation (FBI) regarding the activities of the Central Intelligence Agency (CIA) in the area of intelligence gathering and analysis. This information is being provided to the Bureau for its information and for its use in the conduct of its operations.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a front organization for the CIA.

1. This report shows on the face of it that the Government is all wrong in its estimate of the situation in the world. The Government is all wrong in its estimate of the situation in the world. The Government is all wrong in its estimate of the situation in the world.

[illegible]

3. Laid before the Committee on the 10th day of June 1908.

1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of Nevada:

THE POLICE IN BRITAIN

reproduced and published from the original. All the material and

and the Court said that the "system of the United States is a system of the United States and the United States is a system of the United States."

[illegible]

in this case discharging the petitioner from his position as Patrolman, Department of Police be and the same is hereby ordered by the Court."

While the ordering part of this judgment is practically meaningless and noneffective, nevertheless, both parties have seen fit to treat the order as one that overrules the motion of the respondents to quash the writ and that sustains the motion of the petitioner to quash the record of the Commission. In our view, whatever may have been the purpose of the judgment order, it should not be allowed to stand.

The respondents contend that the return of the Commission establishes that it had jurisdiction of the person of the petitioner and of the subject matter, that specific charges were filed against the petitioner and that he was duly served with notice of the time and place for hearing the charges, and that the record shows that there was evidence fairly tending to support the charges and that the Commission proceeded in due form of law, and that the trial court, under the return of the Commission, was without power to review the order of the Commission on the ground that the inferior tribunal wrongfully removed the petitioner from office. This contention is plainly a meritorious one. (See the late case of Garroll v. Houston, 341 Ill. 531.) The order of the Superior court is so indefensible that the petitioner makes but a feeble effort to defend the same. He contends that no proper notice was served upon him as to the time and place of the hearing of the charges. There is not the slightest merit in this contention. The return shows that he was personally served with notice of the charges and that the Commission would have a hearing of the charges in Room 612, City Hall, on the 25th day of February, A. D. 1923, at 10 o'clock a. m. Moreover, the petitioner, in his petition, admits that he received a notice of the charges and specifications and the time for the hearing of the same.

The respondents contend that there is another reason why the judgment of the Superior court must be reversed: that the charges were filed on February 28, 1925, and the petitioner was discharged by an order of the Commission entered February 25, 1925; that no facts were asserted in the petition for certiorari ^{proven on the hearing} _{to excuse the delay in filing the petition;} that such delay constitutes laches and that the petitioner was therefore not entitled to the relief he sought. This contention is also a meritorious one. (See Carroll v. Houston, supra, p. 938.) The petitioner does not even attempt to answer this contention of the respondents.

In a final effort to sustain the judgment of the Superior court the petitioner argues that the trial judge investigated the facts relating to the alleged charges against him "and on the promise of the plaintiff herein that he would waive all rights to his back salary, issued an order quashing the record and the findings of the Civil Service Commission of the City of Chicago and caused the waiver of back salary to be entered as a part of the judgment entry," and that as a result of the action of the trial court the petitioner was returned to his position as patrolman, "where he has since rendered very satisfactory service." Such waiver would, of course, be no warrant for the entry of the judgment in question, nor had the trial court the right to review the findings of the Commission. (Carroll v. Houston, supra.)

The judgment of the Superior court of Cook county is reversed and the cause is remanded with directions to the trial court to quash the writ of certiorari issued in the cause and to dismiss the petition of the petitioner.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Kerner, J., concur.

The respondents contend that there is no such thing as a

judgment in the nature of a verdict, and that the

two charges were filed on February 27, 1927, and the judgment

was rendered on the 28th of the same month, and that the

judgment was not entered in the public records until

after the expiration of the time for appeal, and that the

judgment is not a final judgment. This contention is also

supported by the fact that the judgment is not a

judgment in the nature of a verdict, and that the

judgment is not a final judgment.

In a final effort to sustain the judgment of the

respondents, the respondents contend that the

facts relating to the charges against him and on the

of the plaintiff herein that he would waive all rights to his

rights, based on the facts and the findings of the

Civil Service Commission of the City of Chicago and cannot

of such rights as he would be a part of the judgment

and as a result of the entry of the final judgment the

respondents to the position as respondents, "where he has since

with satisfactory service." Such action would, of course, be

relevant for the entry of the judgment in question, but has

been the basis for the finding of the Commission. United

States v. United States

The judgment of the Superior Court of Cook County is

affirmed and the cause is remanded with directions to the trial court

to grant the writ of habeas corpus and to dismiss

the petition of the respondents.

IT IS SO ORDERED.

Witness my hand and the seal of the Court, at Chicago, Illinois, this 1st day of

35239

OLIVE KASTLE,
Appellee,

v.

JOSEPH E. HECKEL et al.,
Defendants.

JOSEPH E. HECKEL,
Appellant.

437
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

264 I.A. 624³

MR. JUSTICE MCANLAN DELIVERED THE OPINION OF THE COURT.

Olive Kastle, plaintiff, sued Joseph E. Heckel, Archa B. Monroe, Arthro W. Monroe and the City of Chicago, defendants, in an action in case. The case was tried before the court, with a jury, and there was a verdict returned finding defendant Heckel guilty and assessing plaintiff's damages at \$4,350. The other defendants were found not guilty. Judgment was entered upon the verdict and defendant Heckel (hereinafter called the defendant) has appealed.

Plaintiff's amended declaration contains three counts. The first charges that on January 14, 1929, the defendant City of Chicago owned, maintained and controlled the sidewalk in question as a public highway; that it had notice for several weeks prior to the accident to plaintiff that large quantities of snow and uneven ice covered the sidewalk and were allowed to remain there, which condition constituted an obstruction to travel, and that the City did not remove or attempt to remove the snow and ice, and that it thereby violated its duty in that regard; that defendants Archa B. Monroe and Arthro W. Monroe were at the time in question in control and possession, and were the lessees of a part of the building located at 6600 South Halsted street and which building

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OFFICE OF THE

SECRETARY

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D. C.

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D. C.

TO THE SECRETARY OF THE INTERIOR

FROM THE SECRETARY OF THE INTERIOR

RE: [Illegible text]

abutted the sidewalk in question; that the defendant Heckel was the owner of the building and was in possession and control of the same; that at the time in question there was a drain pipe leading from the roof of the building to a point about five feet from the sidewalk, but that no provisions were made to carry the water that might run out of the drain pipe from the drain pipe to the gutters in the street; that it was the duty of defendant Heckel to provide a means of removing rain water and snow water from and off of the roof of the building, "to be carried to the gutter, without flowing over said sidewalk, in the months of December and January, when it would be prone to freeze thereon;" that defendants Archibald M. Monroe and Arthur W. Monroe at the time in question leased and occupied the ground floor of the building and that the other parts of the building were then vacant and untenanted; that it was the duty of the said Monroes to provide for the disposal of rain and snow water so that the same would not run over and upon the sidewalk abutting the building, and freeze into ice and make it dangerous and hazardous for pedestrians to walk upon the same; that defendants Heckel and the Monroes had knowledge and notice of the dangerous condition of the drain pipe and that it discharged water from the roof of the building over and upon the sidewalk and that the water there froze into large pieces of snow, ice, icy hillocks, etc., making it dangerous for pedestrians to walk over and upon the sidewalk; that defendant City of Chicago then and there knew that large quantities of snow, uneven ice, icy hillocks, ridges, holes and uneven surfaces covered the sidewalk and had so covered it for several weeks, and that said ice, etc., was dangerous to walk upon and constituted an obstruction to travel, and that said defendant did not remove, or attempt to remove, said ice, etc., from the sidewalk although it had sufficient notice of the dangerous and hazardous condition of the sidewalk; that

on divers occasions during the month of December, 1928, and the month of January, 1929, there was a great amount of snow deposited on the roof of the building, and during said month of December an unusually large amount of rain water fell and became mixed with the snow and ice that covered the roof; that the snow and rain water were not removed from the roof by any person or persons whatsoever and that all of the defendants allowed large amounts of snow and water to accumulate and remain on the roof of the building; that in December, 1928, and January, 1929, the sun melted part of the snow on the roof and a great amount of water ran down the drain pipe and upon the sidewalk directly in front of the drain pipe; that much of this water remained in pools "among the snow upon the sidewalk;" that the temperature ^{gradually} became colder and the water froze into great chunks and pieces of uneven ice, and the whole sidewalk was then and there covered with icy hillocks, ridges, holes and uneven surfaces, making it very dangerous and hazardous for pedestrians to walk upon said sidewalk, and that such condition continued for about three weeks; that plaintiff was walking in an easterly direction on the said sidewalk, located on the south side of said West 66th street, and had reached a point on the sidewalk about seventy-five feet west of Halsted street, and while she was at all times observing a proper regard for her own safety and was then and there in the exercise of all due care and caution, by means of the premises and as a direct result of the dangerous condition of the sidewalk aforesaid she then and there stumbled against a large ridge of ice and slipped and fell upon the sidewalk with great force, thereby breaking her limb as a direct result of said fall upon the ice, and she was then and there and thereby greatly bruised, hurt, wounded and injured, etc., to the damage of plaintiff in the sum of \$20,000. The second and third counts contain substantially the same charges.

The building in question was two stories in height and was located on the southwest corner of Halsted and 66th streets. There

The building in question was two stories in height and was located on the southeast corner of Market and Main streets. There was a large amount of snow on the roof of the building at the time of the fire, and the snow was very deep. The fire started in the basement of the building and spread rapidly to the upper floors. The fire was extinguished by the fire department, but the damage was extensive. The building was a two-story structure and was used for commercial purposes. The fire caused the loss of the building and the contents thereof. The fire was caused by a gas leak in the basement. The fire department arrived at the scene of the fire and fought the fire for several hours. The fire was finally extinguished, but the damage was too great. The building was a two-story structure and was used for commercial purposes. The fire caused the loss of the building and the contents thereof. The fire was caused by a gas leak in the basement. The fire department arrived at the scene of the fire and fought the fire for several hours. The fire was finally extinguished, but the damage was too great.

were two stores on the ground floor, and between the two stores was an entrance that led up to the second story. On the second story there were several flats, all of which were vacant at the time. The store located on the corner was then occupied by the two Monroes. The other store was vacant. On May 1, 1924, Margaret Flanagan, the then owner of the building and premises, leased the corner store and a brick garage in the rear to E. W. Rothe for a term of five years commencing May 1, 1924. Thereafter she sold the building to Morris Horwitz and assigned her interest in the Rothe lease to him. Rothe occupied the premises until the end of June, 1926, when he sold his business, including his interest in the lease, to the two Monroes. On March 24, 1927, the defendant purchased the building from Horwitz and the latter assigned his interest in the Rothe lease to the defendant. Plaintiff claimed that she was walking east on the sidewalk on the south side of 66th street and when she reached a point on the sidewalk about seventy-five feet west of Halsted street she stumbled against a large ridge or chunk of ice which caused her to fall upon the sidewalk and that she thereby was seriously injured.

The defendant contends that "where a third person sustains injuries through a defect or want of repair of premises in possession of a tenant the tenant and not the landlord is liable," and that in the instant case "the lease gave the tenant the right to make repairs, and obligated him to save the landlord harmless from any claim arising from neglect to remove snow and ice from the sidewalks," and that the defendant is not liable to plaintiff. It is a sufficient answer to this contention to say that the evidence shows clearly that the defendant had possession and control of all parts of the building save that leased to the Monroes. While one of the stores and the flats on the second floor were vacant at the time of the accident, nevertheless, the defendant was in possession and control of the same.

were two others, on the ground floor, and between the two others
was an entrance that led up to the second floor. On the second
story there were several flats, all of which were vacant at the
time. The state located on the corner was then occupied by the
two houses. The state was vacant. On May 1, 1924, however,
Klanagan, the then owner of the building and premises, leased the
corner state and a state garage in the rear to J. L. Jones for a
term of five years commencing May 1, 1924. Thereafter and until the
expiration of the term Jones and his family moved and resided in the corner
lease to him. Jones assigned the premises until the end of June,
1924, when he sold his interest in the building and premises to the Jones
as the two houses. On June 15, 1924, the defendant purchased the
building from Jones and the latter assigned his interest in the
house to the defendant. Plaintiff claimed that she was waiting
and on the day of the sale of the house she was waiting
reached a point on the sidewalk about seventy-five feet west of
defendant's street and stumbled against a large pile of lumber or
which caused her to fall upon the sidewalk and that she thereby
was seriously injured.
The defendant contends that there is no evidence
injuries through a defect or want of repair of premises in possession
of a tenant the tenant and not the landlord is liable, and that in
the instant case the lease gave the tenant the right to make repairs
and obligated him to save the landlord harmless from all claims arising
from repairs to property and the law is otherwise, and that the
defendant is not liable to plaintiff. It is a well-known maxim so
this contention is rejected and the defendant is held liable for the
defendant had possession and control of all parts of the building
and was thus liable to the plaintiff. While one of the above and the
flats on the second floor were vacant at the time of the accident,
nevertheless, the defendant was in possession and control of the same.

and his agent had been seeking to rent these parts of the building for some time prior to the accident. The roof covered and protected the entire building and the water spout drained the entire roof, and the defendant was in possession and control of the roof and the water spout. The defendant contends that under the terms of the lease the Monroes had possession and control of the roof and water spout. We find no merit in this contention. There is a provision in the lease to Bothe that the lessee "will without injury to the roof, remove the snow and ice from the same when necessary, and clean the snow and the ice from the sidewalks in front of said premises," and the defendant argues that because of that provision and because of the fact that a witness testified that the Monroes cleaned the snow and ice off the sidewalk the defendant was led to believe that he had no responsibility with reference to the sidewalks while the Monroes were in possession. The mere fact that the lessees may have been obligated, under the lease, to keep the roof and sidewalk clear from ice and snow, did not take away from the lessor the possession and control of the roof and water spout, and under the facts of this case the defendant, as against the plaintiff, cannot escape responsibility by the claim that he expected the lessee to keep the roof and sidewalk clear of snow and ice. Under the facts of the instant case the rule laid down in East Chicago Masonic Ass'n v. John, 192 Ill. 216, cannot aid the defendant, for in that case the court held (pp. 221-2): "If the coal-hole and vault were constructed and are used for the benefit of the entire premises, the leasing of a portion, only, of the premises would not absolve the owner from his duty to use ordinary care to keep the coal-hole and the covering there-to in a good and safe condition; but if the vault into which the coal-hole opens has no connection with any other part of the building than the basement leased to the tenant, and no benefit inures from it to any other portion of the premises, and the tenant, as against the

and his agent had been seeking to rent space parts of the building
for some time prior to the agreement. The rent seemed and appeared
the entire building and the agent spent during the entire year.
and the defendant was in possession and control of the wall and the
interior space. The defendant continued to rent under the terms of the lease
the Kansas had possession and control of the roof and water space.
to find no merit in this contention. There is a provision in the
lease to the effect that the Kansas "will remain subject to the roof,
interior and exterior walls, and the water space, and shall the
know and the lessee shall be responsible in terms of said business," and
the defendant signed and became a party to said provision and promise of
the lease. The defendant testified that the Kansas claimed the wall
and for all the while the defendant was led to believe that he
had no responsibility with reference to the Kansas while the
Kansas was in possession. The only fact that the Kansas was aware
that defendant made the lease, it was the fact that the Kansas was
from the Kansas, did not make any lease from the Kansas, the possession
and controlled the roof and water space, and under the terms of this
lease the defendant was against the Kansas's promise to keep the
responsibility of the claim that he expended the Kansas to keep the
roof and exterior walls at once and then the Kansas of the
interior and the water space is the Kansas's promise to keep the
the wall, the Kansas and the defendant, for in that case the Kansas
held (pg. 101-102) "If the defendant was to be considered as
the wall and the water space of the Kansas's promise to keep the
building, well, at the Kansas's promise to keep the water space
only to the defendant to keep the water space and the exterior there-
in the Kansas's promise to keep the water space and the exterior there-
the Kansas had no connection with any other part of the building than
the Kansas located in the Kansas, and no promise to keep the
any other portion of the premises, and the Kansas, as against the

owner, has, and is entitled to have, exclusive possession and control of the basement, coal-hole and vault, and has covenanted to keep the same in good repair, then the case should be regarded as within the operation of the general rule that the occupant of the premises, and not the owner thereof, is responsible for injuries received in consequence of a failure to keep the premises in repair."

Cerchiene v. Hunnewell, 215 Mass. 583, cited by defendant as the leading case on the question, is not in point for the reason that in that case the whole building was leased outright to the tenant for a period of twenty years and the lessee took possession of the entire premises in their then condition with the right to make such alterations and repairs as it might deem expedient and to remove the building and erect a new one in its place, "and covenanted to save the defendants as lessors harmless from all loss or damage occasioned by any nuisance made or suffered on the premises, and from any claim or damage arising from neglect in not removing snow and ice from the sidewalks bordering on the premises." The defendant contends that King v. Swanson, 216 Ill. App. 294, is squarely in point. We fail to see how it has any application to the instant case. No question as to whether a landlord or a tenant was responsible for the injury to the plaintiff was involved therein. Other cases cited by the defendant are not analogous to the instant one under the facts.

The theory of fact of plaintiff as to the manner of the accident was that there were ridges and chunks of ice on the sidewalk that had formed from the water from the roof that was deposited on the sidewalk by the drain pipe, and that plaintiff was caused to fall by these ridges or chunks of ice. The theory of fact of the defendant was that at the time in question there were no ridges or "hunks" of ice on the sidewalk and no unevenness of any kind on the sidewalk caused by ice. Plaintiff testified that at the time and place in question it was snowing and there was a covering ^{of snow} on the sidewalk.

that the weight of the
The defendant strenuously contends

evidence is against the claim of plaintiff that she stumbled against a ridge or chunk of ice. We do not deem it necessary to pass upon this contention.

The defendant complains that the court erred in giving to the jury, at the instance of plaintiff, a number of instructions. As to several of the instructions, at least, this contention is a meritorious one. The court gave, at the instance of plaintiff, the following instruction:

"The court instructs the jury that it was the duty of the City of Chicago, defendant, to keep its sidewalks in reasonably safe condition for travel thereon in the ordinary modes by day or by night, and if the jury believe from a preponderance of the evidence that by reason of the accumulation of snow and ice and the formation of a ridge or rough and uneven surface on the sidewalk of snow and ice, at the time and place where plaintiff, Olive Kastle, claims to have been injured, on the south side of 66th street, alongside the building at 6600 Halsted street, in the City of Chicago, the said sidewalk had become and was in an unsafe condition for travel thereon by day or by night, and that defendant's corporate authorities knew, or might by the exercise of ordinary care and diligence have known, of the unsafe condition thereof in a reasonable time to have removed said snow and ice and repair said walk before the alleged injury of the plaintiff, and that, while plaintiff was walking on said sidewalk where it was so defective and unsafe she slipped and fell down upon the sidewalk without fault or want of ordinary care on her part, and she was thereby injured, then the jury must find for the plaintiff."

This instruction assumes that there was an accumulation of snow and ice, and the formation of a ridge or rough and uneven surface on the sidewalk, of snow and ice, at the time and place where the plaintiff claims to have been injured. It is settled law that the court, in instructing the jury, may assume facts to be proved which the uncontroverted evidence shows to be true, but where the evidence is conflicting it is error to assume the truth of controverted facts. It was essential to plaintiff's case that she prove that she was caused to fall by "icy hillocks, holes and uneven surfaces on the sidewalk caused by the water from the roof freezing on the sidewalk." Her claim in that regard was controverted and it was highly prejudicial to the defendant to give this instruction. The defendant contends that the court erred in giving plaintiff's instruction number five.

...and now this conviction...

The following conclusion was the result of the above:

The fact, as the evidence of the fact, is a matter of fact.

It is to be noted of the fact, as the evidence of the fact, is a matter of fact.

Existence was. The fact was, as the evidence of the fact, the

following conclusion:

"The court instructed the jury that it was the duty of the defendant to protect the plaintiff from injury. The court found that the defendant failed to do so and that the plaintiff was injured as a result. The court awarded damages to the plaintiff for medical expenses, pain and suffering, and lost wages. The court also awarded punitive damages because the defendant's conduct was reckless and wanton. The jury returned a verdict in favor of the plaintiff and the court entered judgment accordingly. The defendant has filed a motion for a new trial, but the court has denied it. The case is now closed."

THESE ARE THE FACTS OF THE CASE AS THEY APPEAR FROM THE EVIDENCE SUBMITTED TO THE COURT. THE COURT IS NOT Satisfied THAT THE DEFENDANT IS GUILTY OF THE CHARGE. THE COURT THEREFORE FINDS THE DEFENDANT NOT GUILTY AND GRANTS HIM A VERDICT OF NOT GUILTY.

The instruction is loosely and inaccurately drawn, and portions of it are not applicable to allegations of the declaration or the proof. It should not have been given.

For the errors indicated, the judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

The following is based on the information provided by the author.

It is suggested that the following information be included in the report:

...and

1997-1998

the "discovery" of the "new" hierarchy of class and its effects

2.2.1.1. *Staphylococcus aureus*

CONFIDENTIAL

... ..

35261

BEATRICE LEFKOVITZ,
Appellee,

v.

E. T. MCCORMICK,
Appellant.

44 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

264 I.A. 624⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Beatrice Lefkovitz, plaintiff, sued E. T. McKinley and E. T. McCormick in the Municipal court of Chicago in a fourth class action. The plaintiff, in her amended statement of claim, alleges that the defendants by fraud and deceit induced her to loan them \$200. Each of the defendants filed an affidavit of merits. Thereafter the plaintiff dismissed the suit as to the defendant McKinley. The case was tried by the court and at the conclusion of the evidence the court found the defendant McCormick guilty and assessed the plaintiff's damages at the sum of \$200 "in tort." He has appealed. The plaintiff has failed to file an appearance or a brief in this court.

A number of contentions are raised by the defendant, but in our view of this appeal it is necessary to notice only one. The defendant contends that there is no evidence in the record that even tends to prove him guilty of the charge made in the statement of claim. After a careful examination of the entire evidence in the case we have reached the conclusion that this contention is clearly a meritorious one. The plaintiff made out a prima facie case against the defendant McKinley and it is surprising that she should have seen fit to voluntarily dismiss that defendant from the case.

1934

RECEIVED
JANUARY 10 1934

RECEIVED

COURT OF CHANCERY

U. S. DEPARTMENT OF JUSTICE
APPELLATE

204 A. A. 024

RE. JAMES EARL RAYMOND AND OTHERS VS. THE UNITED STATES

Memorandum of Decision, filed January 10, 1934.

and W. T. McCormack in the Municipal Court of Chicago on a fourth

class action. The plaintiff, in her amended statement of

claim, alleges that the defendant by fraud and deceit induced

her to loan them \$200. Each of the defendants filed an affidavit

of denial. Thereafter the plaintiff dismissed the suit as to the

defendant McKinley. The case was tried by the court and at the

completion of the evidence the court found the defendant McKinley

guilty and assessed the plaintiff's damages at the sum of \$200.

"in fact." He has appealed. The plaintiff has failed to file

an appearance at a trial in this court.

A number of suggestions are raised by the defendant.

but in our view of this appeal it is necessary to notice only one.

The defendant contends that there is no evidence in the record that

even tends to prove his guilt or the injury made in the statement

of claim. After a careful examination of the entire evidence in

the case we have reached the conclusion that this contention is

clearly a mistaken one. The defendant's suit is dismissed.

case against the defendant McKinley and it is suggested that the

should have been left to voluntarily dismiss their action from the

As this case was tried by the court, and as the plaintiff failed to make out a prima facie case against the defendant McCormick, the judgment of the Municipal court of Chicago will be reversed, but the cause will not be remanded.

REVERSED.

Gridley, P. J., and Kerner, J., concur.

in 1918 was not paid by the State, and in 1919
 definitely failed to win a majority vote among the
 members of the Council of the State of Illinois.
 Chicago will be visited, but the State will not be visited.
 Report.

071014, 7, 1, 4 and 1919, 1, 4, 1919.

35284

SID GREENBERG, LEON J. GETHNER
and BOYD T. BAKER, for use of
PERSONAL LOAN AND SAVINGS BANK,
a corporation,

Appellees,

v.

SIDNEY S. MATH,

Appellant.

457
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

264 I.A. 624⁵

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Personal Loan and Savings Bank, a corporation, recovered a judgment by confession against Sid Greenberg, Leon J. Gethner and Boyd T. Baker in the sum of \$165.05. An execution, issued upon the judgment, was returned no property found and no part satisfied. Garnishment proceedings were then commenced against the appellant, Sidney S. Math, and a summons was duly served upon him. He was defaulted and a conditional judgment was entered against him on January 2, 1931, and a writ of seire facias was then duly issued and served upon him. On January 15, 1931, the conditional judgment against him was made final by reason of his failure to appear. On March 16, 1931, the appellant filed a verified petition praying that the judgment entered January 15, 1931, be vacated and set aside. The Bank filed an answer to the petition and also moved to strike it from the files, which motion was allowed by the trial court on March 26, 1931. On April 2, 1931, the appellant filed a written motion to have the conditional and final judgments vacated upon the ground that said judgments were null and void. In support of this motion he filed his affidavit, which, in substance, sets up that Boyd T. Baker, one of the defendants in the original judgment, "was at the time of the commencement of said garnishment proceedings

and at the time of the service of the garnishee summons herein, employed by this garnishee for wages. That no demand in writing was made by the plaintiff herein or by any one on its behalf upon the said employee, Boyd T. Baker, and this garnishee prior to, at or since the commencement of the said garnishment proceedings in accordance with the Statute in such cases made and provided. That no notice or demand was filed by the plaintiff herein or by any one in its behalf, with the Clerk of this court prior to, at or since the commencement of said garnishment proceedings, and that by reason of the above and foregoing facts this court was without jurisdiction, and that the conditional judgment entered herein on January 2, 1931, and the final judgment entered herein on January 15, 1931, were void and of no force and effect." The appellees filed no answer or counter motion to this motion of the appellant, but the trial^{court} entered an order overruling the motion, and from that order the appellant has appealed.

The appellant contends that the final judgment against him, the garnishee, is void for want of proper demand before bringing the garnishment proceedings and that therefore the trial court erred in overruling his motion of April 2, 1931. This contention is a meritorious one. A portion of section 14 of the Garnishment Act, Cahill's St., 1929, ch. 62, is as follows: "Before bringing suit a demand in writing shall be served upon the employer and upon the employe for the excess above the amount herein exempted. Such service shall be had upon the employer, either by delivering a copy of such demand to the employer, or by leaving a copy thereof at the usual place of business of such employer with his or its superintendent, manager, cashier, general agent or clerk. And such service shall be had upon the employe either by delivering a copy of such demand to such employe, or by leaving a copy thereof at his

usual place of abode with some person of his family at the age of ten years or upwards, and informing such person of the contents thereof. Such copies for the employer and employee shall have endorsed thereon the time of service upon them, which shall be at least twenty-four hours previous to bringing suit. Such notice shall be filed with the justice or clerk of the court, with the manner and time of the service of the same endorsed thereon, and the return duly sworn to before some officer authorized to administer oaths, before it shall be lawful to issue a summons in such case or to require an employer to answer in any garnishee proceedings. Any judgment rendered without said demand being served upon the employee, and so proven and filed as aforesaid shall be void." Para v. Reliable Furn. Mfg. Co., 237 Ill. App. 460 (opinion by this division of the court), decides the instant contention, and adversely to the appellees. It follows from the ruling in that case that under the facts set up in the motion of the appellant, the judgments in question were void and that the trial court erred in overruling the appellant's motion to vacate the judgment. The trial court should have ruled the appellees to answer the motion of the appellant.

The appellant did not file a bill of exceptions in this case and the appellees argue that the motion and affidavit in support of it were not properly a part of the common law record and that therefore this court cannot consider the propriety of the trial court's ruling in question. There is no merit in this contention. The Supreme court has repeatedly held that a motion under section 89 of the Practice act stands as a pleading in a new suit and takes the place of a declaration. Therefore no bill of exceptions was necessary in the instant case. The appellees further contend that the matters set up in the motion of April 2 should have been pleaded in the appellant's petition of March 16 and that the judgment of the

many cases of state with some persons of his family at the age
of ten years or upwards, and interesting work done of the contents
thereof. When asked for the subject and subject which have
related through the time of service upon those which shall be as
least twenty-five years previous to making this. When asked
shall be filed with the Justice of Peace of the county, with the
county clerk at the office of the court, and the clerk shall
the record only after he has been duly examined as to the
actual value it shall be found to have a minimum in each case of
to require an employer to answer in any particular proceedings. Any
judgment rendered against said person shall be void. John W.
and so proven and filed as otherwise shall be void. John W.
California State Bar, City and County of San Francisco
by the court, Justice of the Peace, and otherwise as the
appeal. It follows from the ruling in that case that under the
facts set up in the motion of the appeal, the judgment in question
was void and that the trial court acted in overruling the appellant's
motion to vacate the judgment. The trial court should have ruled
the appeal to answer the motion of the appellant.
The appellant did not file a bill of exceptions in this
case and the appellant argues that the motion and affidavit in support
of it were not properly a part of the record and that
therefore this court cannot consider the propriety of the trial
court's ruling in question. There is no merit in this contention.
The Supreme court has repeatedly held that a motion under section 92
of the Practice act stands as a pleading in a new suit and takes the
place of a petition. Therefore no bill of exceptions was
necessary in the instant case. The appellant further contends that
the motion set up in the motion of April 8 should have been pleaded
in the appellant's petition of March 15 and that the judgment of the

trial court as to the said petition is res judicata of the matters and things set up in the motion of April 2. It is a sufficient answer to this contention to say that the appellees did not see fit to interpose in any way the question of res judicata to the appellant's motion of April 2 and it is fundamental that the defense of res judicata must be raised by plea or answer.

The judgment of the Municipal court of Chicago of April 10, 1931, overruling the appellant's motion of April 2, 1931, is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Kerner, J. concur.

[illegible]

On 10/10/1971, following the applicant's review of 10/10/1971, it was determined that the applicant was not qualified for further consideration and was not recommended for hire.

1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

35649

DOROTHY KOCH,
(Complainant),
Appellee,

v.

EDWARD L. RICH et al.,
Defendants.

HERBERT F. GROBE,
Appellant.

INTERLOCUTORY

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

264 I.A. 625¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Dorothy Koch filed her verified bill against Edward L. Rich, Nathan Shefner and Herbert F. Grobe, but only the answer of defendant Grobe, appellant, is contained in the record. On motion of complainant, "upon the verified bill of complaint and the answer filed herein," the chancellor appointed a receiver of the premises described in the bill and the improvements thereon, and the rents, issues and profits therefrom. The defendant Grobe alone has appealed from that order.

The bill alleges, in substance, that in February, 1928, complainant acquired title to the real estate described in the bill; that on June 8, 1928, she executed a trust deed to the Chicago Title and Trust Company to secure an indebtedness of \$42,000; that on July 27, 1928, she executed a junior trust deed to the same company to secure two promissory notes signed by her and Wilhelmina Koch, aggregating in amount \$10,800, and delivered them to defendant Shefner, who was the solicitor for defendants Rich and Grobe; that in consideration for the execution and delivery of the said notes to Shefner he agreed to turn over to Fovenmushle, Inc., "a concern engaged in the business of underwriting first mortgage loans," the

sum of \$8,650, "providing that the said Bovenmuhle Inc. would execute a written guaranty that the building sought to be erected upon the said premises could be completed in accordance with the plans and specifications upon the deposit of the said sum of \$8, 650 together with the proceeds of the first mortgage loan in the amount of \$42,000;" that on August 4, 1928, Shefner paid to the said Bovenmuhle, Inc., in cash, the sum of \$5,575 on account of the said mortgage; that thereafter Shefner paid the first mortgage then existing against the real estate in the amount of \$3,000, together with the accrued interest thereon in the amount of \$75, and procured a release of the said mortgage, which release was recorded on September 17, 1928; that about February 15, 1929, Bovenmuhle, Inc., refused to make any further payment on account of the said first mortgage unless and until additional funds were supplied so as to assure it that there would be sufficient funds available to complete the building free and clear of mechanics' liens; that thereupon complainant and Wilhelmina Koch procured a further loan, not secured by a mortgage, from Shefner, in the sum of \$600, for which they executed a ninety-day note in the sum of \$750, payable to Shefner, with interest thereon at six per cent per annum; that Shefner, on February 26, 1929, deposited with Bovenmuhle, Inc., the said \$600; that before making the said loan of \$600, Shefner, on February 21, 1929, required complainant to execute and deliver to him a warranty deed to the premises, which was executed and delivered to Shefner as security for the payment of the note for \$750, "and also as additional security for the payments then due and thereafter to become due upon the second mortgage of \$10,500 theretofore executed and delivered to the said Nathan Shefner;" that this deed, at the direction of Shefner, named Grobe as grantee; that payments aggregating the sum of \$1,303 were made on account of the second

mortgage notes to Shefner and Rich; that about May 15, 1929, the building erected on the premises was fully completed and ready for occupancy, and that on or before June 20, 1929, it was fully rented and occupied; that on June 20, 1929, Shefner caused the deed to Grobe to be recorded, and about June 26, 1929, Rich, by Shefner as his solicitor, filed his bill in the Circuit court of Cook County against the complainant et al., "whereby the said Rich sought to foreclose the aforesaid second mortgage securing the notes aggregating \$10,500;" that about June 28, 1929, Shefner and Rich caused notices to be served upon each and all of the tenants of the building to the effect that they would thereafter collect and receive the rents on the premises; that immediately upon the serving of the notices Shefner and Rich took possession of the premises in the name of Grobe and proceeded thereafter to collect the rents from the building; that beginning with the month of July, 1929, Rich and Shefner collected all of the rents, issues and profits from the premises, at the rate of \$720 per month, and have continued to collect the rents from that date to the present time; that Shefner and Rich have collected from the premises, "as rents, issues and profits," the total sum of \$17,280 from and after July 1, 1929, to the time of the filing of the bill; that on February 14, 1930, Rich and Shefner recovered a judgment by confession in the Municipal court of Chicago against complainant and Wilhelmina Koch for the sum of \$10,621 and costs in the amount of \$19.60; that this judgment was obtained on the remaining note of \$10,000, secured by the second mortgage; that thereafter Rich, by Shefner, his attorney, recovered by garnishment proceedings instituted against Devenmuehle, Inc., and based upon the said judgment by confession, the sum of \$1,058.10, which Rich, in his said bill of complaint, alleges he credited to complainant on the said judgment; that the total amount of money received from Rich and Shefner on account of the second mortgage was \$8,650; that the second

mortgage notes aggregated \$10,500, with interest at the rate of six per cent per annum "to secure the said payment of \$3,000;" that the interest rate on the loan of \$4,000 to complainant was in excess of fourteen per cent and that the sum received from Rich and Shefner on account of the note of \$780 was \$400, and that complainant was charged a rate of interest on this loan in excess of one hundred and six per cent per annum; that Rich, Shefner and Grobe contracted to receive a greater rate of interest on account of the \$10,500 Junior mortgage and the notes securing it and the note of \$780, than seven per cent per annum, and therefore are entitled to recover only the principal sum due to them; that Rich and Shefner received by way of rent, issues and profits from the premises since July 1, 1929, the sum of \$17,280, "represented by monthly collections of rent at the rate of \$720 per month;" that complainant from August 8, 1928, up to and including January 3, 1929, paid to Rich and Shefner the sum of \$1,303 on account of complainant's indebtedness to them; that thereafter the sum of \$1,055.16 was recovered by Rich and Shefner from Doremuchle, Inc., in the garnishment proceedings in the Municipal court, and that therefore the sum of \$2,361.16 was paid on account of the principal amount of \$9,250 received from Rich and Shefner by the complainant and that the said Rich and Shefner "in the collection of the rents, issues and profits from the said premises from and after the first day of July, 1929, had fully collected the balance remaining due to them in the amount of \$6,893.34 by the first day of June, 1. 1. 1930, and that therefore there is due to your Gratrix and the said Wilhelmina Koch from Rich and Shefner the total sum of \$10,392.16 with interest thereon from the respective dates that the sums were collected by Rich and Shefner as rents from the said premises;" that Rich and Shefner from time to time after June 1, 1929, made various payments on account of principal and interest due on the first

mortgage on the said premises, and made further payments for taxes during the said period and are entitled to credit for such payments on account of the first mortgage, principal and interest and the said taxes; that complainant is informed and believes that Rich and Shefner have made other disbursements, unauthorized and illegal, in and about the said premises, and that therefore they are entitled to no credit whatsoever on an accounting sought to be had by complainant; that complainant "represents that no consideration passed from Edward L. Rich or Nathan Shefner or the grantee, Herbert F. Grobe, or from any person in the behalf of any one or more of the said aforementioned persons for the execution and delivery of the said Warranty Deed from Dorothy Koch, nee Marison, to Herbert F. Grobe, * * * other than the agreement that the said Warranty Deed should be held by the said Nathan Shefner and Edward L. Rich and Herbert F. Grobe as additional security for the payment of one note of \$750 dated May 28, 1929, and for the payment then due and to become due upon the second mortgage note aggregating \$10,500, and that the said Warranty Deed was not an absolute deed but was intended only as additional security in the nature of a mortgage to induce the said Nathan Shefner and Edward L. Rich to make the payment of \$600 requested by your Oratrix and Wilhelmina Koch at that time;" that Rich, Shefner and Grobe have since June 28, 1929, "held possession of the said property and have treated the property exclusively as the property of Herbert F. Grobe, and that they have collected all the rents, issues and profits therefrom, although the indebtedness for which the warranty deed from your Oratrix to Grobe had long since been paid, and that the said Grobe should make a reconveyance of the said premises to your Oratrix and repay to your Oratrix the sums of money so held and collected by the said Grobe, Rich and Shefner from the said premises over and above the amount of the principal indebtednesses of your Oratrix to the said Rich, Grobe and Shefner;" that an accounting

... mortgage on the said premises, and such further payments for taxes
during the said period and the period of months for which payments
on account of the first mortgage, principal and interest and the
said taxes; that complainant is informed and believes that said
defendant have made other disbursements, unauthorized and illegal, in
and about the said premises, and that defendant has not collected
as an credit whatsoever on an accounting sought to be had by com-
plainant; that complainant represents that an investigation of the
said Robert L. Grobe as Robert Grobe at the number, Newark N.
Jersey, or from any person in the behalf of any one or more of the
said aforementioned persons for the execution and delivery of the
said certain deed from Robert Grobe, now deceased, to Robert L.
Grobe, is a fraud upon the agreement that the said Robert L.
Grobe should be held by the said Robert Grobe and Robert L. Grobe and
Robert L. Grobe as additional security for the payment of one note
of \$1000 dated May 28, 1928, and for the payment thereon and to become
due upon the second maturity date of said note, and that the
said Robert L. Grobe was not an absolute deed but was intended only as
additional security in the nature of a mortgage to induce the said
Robert Grobe and Robert L. Grobe to make the payment of \$1000 requested
by your trustee and defendant Grobe at that time; that said
defendant have since that time, 1927, still possession of the said
property and have received the property exclusively as the property
of Robert L. Grobe, and that they have collected all the rents, issues
and profits thereon, although the defendant is not the owner
and from your trustee to Grobe had been since then paid, and that the
said Grobe should make a reservation of the said premises to your
trustee and repay to your trustee the sum of money so held and
collected by the said Robert Grobe and Robert L. Grobe from the said premises
over and above the amount of the principal indebtedness of your
trustee to the said Robert Grobe and Robert L. Grobe, that an accounting

should be taken between the parties and if it appear that complainant owes to the said Rich, Shefner and Grobe any amount, she is ready, able and willing "and hereby offers to pay the same within a reasonable time to be fixed by the Court and that she thereupon ought to have a reconveyance of the said premises from the said Herbert F. Grobe" to complainant upon such terms and within such time as may be fixed by the court, etc.; that Rich, Shefner and Grobe, or one or more of them, who may have possession of the second mortgage note in the amount of \$10,000, surrender up to complainant the note duly cancelled in order that complainant may secure from the Title and Trust Company the full release of the said mortgage, and that if the said parties, or either of them, have any bonds or coupons secured by the first mortgage underwritten by Dovenmuehle, Inc., for which the said parties shall have made payment on account of principal and interest they shall likewise surrender up the said bonds and coupons to the complainant. The bill prays that an accounting may be taken of all dealings and transactions of Rich, Shefner and Grobe from and after July 27, 1929, to the date of the filing of the bill, in which the property in question may be in any way involved, and that the said parties may be declared to pay to complainant all sums of money which they or any one or more of them may have obtained from the premises over and above the amount which was actually due to them on account of the principal on the second mortgage indebtedness of \$10,000 and the ninety-day note of \$750, and that the deed of conveyance from complainant to Grobe dated February 20, 1929, be decreed not to be an absolute conveyance, but to have been intended only as additional security, and to be in the nature of a mortgage, and that the said defendants be decreed to surrender to complainant the second mortgage note of \$10,000, dated June 27, 1923, for cancellation, and that upon the failure of the said defendants to surrender the said note, the Title and Trust

about to sail before the British had it in their grasp.

...and the great and small will live in peace.

4 when the top of water "dressed" surface has old, yellowed

RECEIVED THE 10th JAN 1964

might be that a reinforcement of the old ground rules is

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

as may be found by the writer, the following are the

There is more of them, who have possession of the estate

There is no doubt that the results of this study are of great importance to the field of research on the effects of the environment on the development of the child. The results of this study are of great importance to the field of research on the effects of the environment on the development of the child.

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and these findings are consistent with the role of the hippocampus in spatial memory.

to the extent that the Commission is not satisfied that the applicant has provided sufficient information to enable it to make a decision on the application, it may request the applicant to provide further information.

Approved by the Board of Directors, Inc.

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THE UNIVERSITY OF CHICAGO LIBRARY

RE: J. H. ...

oil. To make cement for walls use 1 lb. of oil to 10 lb. of cement.

to state and so, since, the whole world has been so treated

History of the Bill, to which the Secretary is referred may be in

no one involved, and that the FBI will continue to be vigilant for

© 1998 by the American Psychological Association, 0893-3200/98/\$12.00 DOI: 10.1037/0893-3200.12.4.571

THESE ARE THE ONLY TWO CASES WHERE THE SUBJECTS WERE NOT IN THE SAME GROUP.

13 no longer, and to increase by 1000 at all times in 1912

When the system is in the *idle* state, the *idle* state is reached again after some

44-38861-1000

On 11/11/1943, it was decided that the following should be the basis for the new organization:

It is not intended to be used as a substitute for the actual use of the

1. The purpose of this study is to determine the effect of the use of the

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

[illegible]

Company, as trustee under the trust deed dated June 27, 1928, be decreed to execute a release of the said second mortgage trust deed and that for that purpose be made a party defendant to the bill, and that Grobe be decreed to reconvey the premises to complainant, and "that a receiver may be appointed * * * to collect and receive all rents from the aforesaid premises until the further order of this Court, and that youratrix may have such other and further relief in the premises as equity may require, and to the Court shall seem meet."

The appearance of Rich, Shefner and Grobe was entered by Shefner, as their solicitor, on September 2, 1931. Complainant's motion for the appointment of a receiver was made on September 3, 1931, and on that date the chancellor ordered the defendants to plead, answer or demur to the bill of complaint within fourteen days from that date, and the motion for the appointment of a receiver was continued until September 17, 1931. The answer of the defendant Grobe, appellant, was filed on September 17, 1931. On September 17, 1931, the motion was continued until September 23, and the order appointing the receiver was not entered until September 29, 1931. At that time the only answer filed, so far as the record discloses, was that of Grobe. His answer, in substance, states that about August 1, 1928, Shefner "communicated with this Defendant and stated to him that he had in his possession junior mortgage notes aggregating the principal sum of \$10,500, secured by trust deed upon the premises described in the Bill of Complaint herein, and that he desired to sell said mortgage; that there was then in the course of construction upon said premises a building to contain twelve apartments, and that Dovenmuehle, Inc., a concern engaged in the business of underwriting first mortgage loans, had negotiated a \$42,000 first mortgage construction loan for the proposed building; that the net proceeds of said first mortgage

... as stated under the first head of the bill, it is
desired to amend a certain of the provisions of the bill,
and that for that purpose he made a party reference to the bill,
and that those be desired to remove the provisions to amendments,
and "that a receiver may be appointed" * * * to collect and receive
all rents from the premises unless until the further order of
this Court, and that your Honor may have such other and further
relief in the premises as equity may require, and be the Court shall
deem meet."

The appearance of John, Walker and Stone was entered by
Walker, as their solicitor, on September 2, 1931. Complaintant's
motion for the appointment of a receiver was made on September 2,
1931, and on that date the Chancellor ordered the return to be
made, answer or demurr to the bill of complaint within ten days,
and the return to be made, and the return for the appointment of a re-
ceiver was continued until September 17, 1931. The answer of the
defendant Grobe, applicant, was filed on September 17, 1931. In
Paragraph IV, 1931, the answer was continued until September 17,
and the order appointing the receiver was not entered until September

29, 1931. At that time the only answer filed, on for as the
return disclosure, was that of Grobe. His answer, in substance,
admits that about August 1, 1931, Walker communicated with him
relative to the fact that he had in his possession certain
mortgage notes representing the principal sum of \$10,000, secured
by trust deed upon the premises described in the bill of complaint
hereto, and that he desired to sell said mortgage notes and that
there is no record of communication with said plaintiff's solicitor
as to the sale of said mortgage notes, and that defendant, Grobe, had
engaged in the business of underwriting first mortgage loans, and
received a \$4,000 first mortgage commission from the
proposed plaintiff that the net proceeds of said first mortgage

loan was not sufficient to pay for the construction of said building, and that Dovenmuehle, Inc., would not disburse any part of said loan until there was deposited with them a sum which, together with the net proceeds of the first mortgage loan, would be sufficient to insure the completion of said building free and clear of mechanics' liens; that in addition to the amount required to be deposited with Dovenmuehle, Inc., it would be necessary to pay off and release a prior mortgage on the vacant in the principal sum of \$5,000, plus accrued interest, which then constituted a prior and superior lien to the mortgage underwritten by Dovenmuehle, Inc. and said junior mortgage;" that Shefner informed appellant that he had been in touch with Dovenmuehle, Inc., with reference to the exact amount necessary to be deposited in said construction account to insure the opening of said loan, and that Dovenmuehle, Inc., had advised Shefner that if the sum of \$5,375 were deposited with them, they would immediately commence paying out the proceeds of said loan to the contractors entitled thereto, and that, in their judgment, based on the sworn statements submitted by W. Koch & Son, the general contractors for said building, there would then be sufficient moneys on hand to complete the building; that Shefner informed appellant that said notes and junior mortgage had been turned over to him by Mrs. Wilhelmina Koch, the general contractor for the building, with the request that Shefner endeavor to sell and dispose of said mortgage on the best terms possible; that appellant informed Shefner that he would be willing to purchase the mortgage if all of the facts represented by him were true, and would pay for said notes and mortgage the sum of \$9,300, and on August 1, 1928, appellant delivered to Shefner a check for \$9,300, and at the same time received from Shefner the notes and mortgage described in the bill; that appellant at no time had any dealings with complainant and that

he did not see her on August 1, 1928, at the time he purchased the mortgage, and has never met complainant since said date; that all of his dealings in respect to said mortgage were solely with Shefner and with no other person whatsoever; that at the time he purchased the mortgage Shefner exhibited to him an opinion of title issued by the Chicago Title and Trust Company July 31, 1928, showing good title in complainant, subject only to the lien of trust deeds securing the principal sums of \$3,000, \$42,000 and \$10,500, respectively; that after an examination of this opinion of title appellant paid over to Shefner the sum of \$9,300 upon the express assurance of Shefner that the prior trust deed of \$3,000 and accrued interest would be immediately paid to the legal holder thereof, and said mortgage released of record, and that the balance thereof would be deposited with Bovenmuehle, Inc., so as to insure the completion of the building; that on February 21, 1929, Shefner stated that Bovenmuehle, Inc., were refusing to make any further payments from the proceeds of said loan because there were not sufficient moneys in its hands to complete said building free and clear of mechanics' liens; that Bovenmuehle, Inc., would not make any further disbursements until an additional sum of \$600 was deposited in said building account; that the general contractors, W. Koch & Son, would be willing to pay to appellant the sum of \$150 towards the legal expenses incurred by appellant in preparing the necessary legal papers to evidence the loan of the sum so requested and other services necessary to adequately safeguard appellant's interests, and would execute a note for the sum of \$750 to secure the payment of the loan requested and legal expenses incurred by appellant; that at the time appellant purchased said notes and mortgage it was represented to him by Shefner that the building then in the course of construction would be fully completed and

ready for occupancy by not later than October 1, 1928; that on August 1, 1928, the building was up to the roof, and that as soon as the amount demanded by Devenmuehle, Inc., was deposited in the loan account, the contractors would be paid and the work would go ahead rapidly so as to insure the completion in apt time for October, 1928, renting; that notwithstanding these representations, the work did not progress rapidly, but, on the contrary, no work whatsoever was done in and about the building for a space of more than five months after August 1, 1928; that on February 1, 1929, appellant was requested to advance the sum of \$600 in order to place the construction account in such shape that Devenmuehle, Inc., would be warranted in continuing to make payments to the various contractors who were furnishing work, labor and materials for the building; that when this defendant was requested to advance this sum of \$600 he stated to Shefner that he was dissatisfied with the slow progress of constructing the building; that the complainant was not making the payments called for by the junior mortgage in the amounts or at the times provided therein, and that the security was very questionable, and that appellant would not make any advances for account of complainant unless she would execute and deliver a deed conveying said premises to appellant, to be held in escrow until May 28, 1929, and to be delivered to appellant in full satisfaction and extinguishment of the indebtedness evidenced by said notes and trust deed in the event complainant on May 28, 1929, was unable to pay both the installments of principal and interest which would on that date be due and unpaid on said junior mortgage according to its terms, and said note of \$750 on account of moneys to be advanced to Devenmuehle, Inc., for account of complainant; that on February 21, 1929, appellant was informed by Shefner that Mrs. W. Koch had delivered to him a warranty deed executed by complainant and her husband as grantors, conveying the premises to appellant, and exhibited the deed to him; that Shefner

ready for occupancy by not later than October 1, 1933; that on August 1, 1933, the building was up to the roof, and that on such as the amount demanded by Government, Inc., was deposited in the loan account, the contractors would be paid and the work would be ahead rapidly so as to insure the completion in the time for October, 1933; that notwithstanding these representations, the work did not progress rapidly, but, on the contrary, no work whatsoever was done in and about the building for a space of more than five months after August 1, 1933; that on February 1, 1935, appellant was requested to advance the sum of \$500 in order to place the construction account in such shape that Government, Inc., could be warranted in continuing to make payments to the various contractors and were told that they could not advance the sum of \$500; that when this demand was requested to advance this sum of \$500 he stated to Walker that he was dissatisfied with the slow progress of construction of the building; that the complaint was not making the payments called for by the loan account in the amount of \$2,000; that three hundred dollars, and that the money was very precious, and that appellant would not make any advance for account of \$500; appellant advised the bank account and advised a check covering said amount to appellant, so he made in person until May 20, 1935, and to be delivered to appellant in full satisfaction and reimbursement of the indebtedness evidenced by said notes and check sent to the bank; that on May 23, 1935, the amount of \$500 was paid to the bank; that appellant of principal and interest which would on that date be due and would on said further payments amounting to the same, and said rate of \$100 an amount of money to be advanced to Government, Inc., for the account of appellant; that on February 1, 1935, appellant was informed by Walker that Mrs. A. Walker had advised to him a verbally that appellant of appellant and his business as follows:

The premises so appraised, and exhibited the fact to him that Walker

at the same time delivered to appellant a principal promissory note executed by Mrs. E. Koch, dated February 20, 1929, for the sum of \$750, due and payable on May 23, 1929, that appellant thereupon delivered to Shefner a check for the sum of \$600 to be paid over to Dovenmuckle, Inc., and to be credited to the construction account of the building; that said sum of \$600 was in fact deposited with Dovenmuckle, Inc., and so credited by it; that on May 23, 1929, the note of \$750 was not paid by complainant or by anyone on her behalf and that on that date none of the past due payments of principal and interest on the junior mortgage were paid by complainant or anyone on her behalf; that after making repeated demands that the amounts so past due and owing be paid, appellant, on June 22, 1929, demanded of Shefner that he deliver to him the warrant deed held by Shefner in escrow, and that Shefner, pursuant to said demand, delivered the deed to appellant and the same was recorded on that date; that appellant admits that since July 1, 1929, he has been in possession of the premises "and has collected all of the rents, issues and profits therefrom; that the total amount collected by him up to and including August 31, 1931, is the sum of \$16,660;" that at the time he took possession of the building only ten of the apartments were rented and occupied on that date and some of the tenants paid no rent for the month of July, 1929, for the reason that concessions had been granted to them by complainant; that on June 22, 1929, the building was not fully completed; that on June 22, 1929, there was due and owing to various sub-contractors for work, labor and materials furnished in and upon the said premises, the sum of \$3,088.34, in addition to interest on the first mortgage from June 3, 1928, to June 22, 1929, amounting to the sum of \$2,571.93; that there was then on hand in said loan account the sum of \$1,633.16, making a deficit of \$4,535.11 in the account, no part of which was paid by complainant; that since June

22, 1929, appellant has paid to Devenmuehle, Inc., on account of principal and interest on the first mortgage of \$42,000 the sum of \$10,531.82; that he has expended the sum of \$8,437.36 in and about the maintenance and operation of the premises since he took possession thereof; that appellant, since June 22, 1929, has disbursed the sum of \$19,019.18 on account of principal and interest payments on the first mortgage and the operating and maintenance expenses of the building; that he has collected the sum of \$16,660 in rents, issues and profits therefrom down to and including the 31st day of August, 1931, and also the additional sum of \$1,068.16 from Devenmuehle, Inc., by virtue of a garnishment levied against the balance remaining in said loan account, or the total sum of \$17,728.16; that he has expended the sum of \$1,301.62 in excess of the amount actually collected by him since he took over the operation of the building; that after appellant acquired title to said premises, two bills were filed in the Circuit court of Cook county to enforce mechanics' liens against said premises, and it was necessary for him to employ solicitors to defend the suits; that he succeeded in settling one suit before large costs were incurred, and recently succeeded in disposing of the second suit involving an alleged claim amounting to approximately \$1,500; that there were other claims for liens, to foreclose which suits were threatened, and appellant was able to effect great savings by guaranteeing payment of the amounts which the various contractors agreed to accept in settlement of the amounts due them; that during the past two and a half years complainant has made no claim that she had any interest in the premises, or that said warranty deed was not given in full extinguishment and satisfaction of said junior mortgage so purchased by appellant, or that appellant was under any duty whatsoever to account to complainant for any moneys collected by him from said premises; that complainant has at no time tendered or offered to pay to appellant the amount invested by him in said premises, together with interest thereon, and

the costs and expenses incurred by him in defending the various suits filed to enforce liens thereon and other claims against said premises.

Appellant contends that even if it be assumed that the warranty deed of February 21, 1929, was, as alleged in complainant's bill, intended only as additional security, and in the nature of a mortgage, and that appellant, as the grantee named in the deed, was in possession as a mortgagee, nevertheless, as against him, a mortgagee in possession, holding the premises as security for his debt, a court of equity will not appoint a receiver of the rents and profits, so long as there is anything due him, and that the chancellor erred in appointing a receiver in the instant case because his answer shows that there was money due and owing to him on account of the alleged mortgage. It is a sufficient answer to this contention to say that the verified bill not only alleges that there is nothing due appellant on account of the deed in the nature of a mortgage, but it also alleges that there was due complainant, at the time of the filing of the bill, as a result of rents collected by appellant, Shefner and Rich, the sum of \$10,392. In the case of Springer v. Lehman, 50 Ill. App. 139, 143, cited by appellant, it was conceded that if the instrument in question was held to be a mortgage, that about \$30,000 was due the mortgagee at the time of the filing of the bill. Dickason v. Dawson, 35 Ill. 53, also cited by appellant, was an action of forcible entry and detainer and the court held that the appellant could not recover for the reason that no demand for the possession of the premises was made before the commencement of the suit, and the court further stated that the appellant could not recover as against the appellee because the latter "was in possession under a mortgage for condition broken, which had priority to the judgment under which appellant claimed possession, and she had a right to hold the possession

the contents of the report of him in relation to the various
notes filed to collect debts and other claims
with reference to

Applicant contends that even if it be assumed that the
debt of February 22, 1932, was, as alleged in respondent's
bill, intended only as additional security, and in the nature of
a mortgage, and that applicant, as the grantor named in the deed,
was in possession as a mortgagee, notwithstanding, as against him,
mortgagee in possession, holding the premises as security for his
debt, a court of equity will not appoint a receiver of the rents
and profits, so long as there is anything due him, and that the
chancellor erred in appointing a receiver in the instant case be-
cause his answer shows that there was money due and owing to him
on account of the alleged mortgage. It is a sufficient answer
to this contention to say that the parties did not stipulate
that there is nothing due applicant on account of the debt in the
nature of a mortgage, but it also alleges that there was due con-
plaintiff, at the time of the filing of the bill, on a renewal of
rents collected by applicant, between and with the sum of \$10,000.
On the case of Wheeler v. Wheeler, 201 Ill. App. 2d, 143, cited by
applicant, it was held that if the instrument in question was
held to be a mortgage, that about \$20,000 was due the mortgagee at
the time of the filing of the bill. Dickson v. Dickson, 22 Ill. 2d,
also cited by applicant, was an action of specific debt and plaintiff
and the court held that the applicant would not recover for the
reason that no account for the possession of the premises was made
before the judgment at the trial, and the court further stated
that the applicant would not recover on account of the unpaid balance
the parties had in possession of a mortgage the applicant
without, when not paid by the defendant under which applicant
obtained possession, and also that it held the premises

as mortgagee, as against Foss (the mortgager) or a purchaser from or under him, until her mortgage debt should be satisfied." If complainant had not alleged in her bill that she owed nothing to appellant under the instrument in question, an entirely different question would be presented. In the instant case, for the purpose of passing upon the motion for the appointment of a receiver, the chancellor had a right to assume from the allegations in the bill and from the nature of the answer of appellant that the deed of February 21, 1929, was intended as a mortgage. If, as appellant avers, the deed was delivered by Shefner to him on May 23, 1929, in full satisfaction and extinguishment of the indebtedness of complainant, then why were not the notes, one for \$10,000 and the other for \$750, duly cancelled and delivered to complainant? The deed was recorded on June 20, 1929, and yet, on June 26, 1929, Rich, by Shefner as his solicitor, filed his bill against complainant et al. to foreclose the second mortgage. On February 14, 1930, Rich and Shefner recovered a judgment by confession against complainant and Wilhelmina Koch for the sum of \$10,621 upon the remaining note of \$10,000 secured by the second mortgage, and thereafter Rich, by Shefner, his attorney, recovered by garnishment proceedings against Dovenmuehle, Inc., the sum of \$1,058.15, which proceedings were based upon the judgment by confession. None of the allegations in the bill touching these matters is answered by appellant. In his answer he alleges that all of his dealings were with Shefner, but the latter, so far as this record discloses, had not seen fit to answer the bill at the time of the hearing of the motion for the appointment of a receiver, although he had been ruled to answer by September 17. Nor had Rich, so far as this record discloses, answered the bill at the time of the hearing. From the fact that appellant evaded answering certain material allegations in the bill, the chancellor was warranted in assuming that the claim of appellant

that the deed in question was an absolute conveyance, was a mere pretense. We certainly are not warranted in holding that the chancellor abused his discretion in the appointment of a receiver and the order of the Superior court of Cook county is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

that the time in question was not a holiday, and that the
 said persons, as aforesaid, did not observe in said time
 the religious observance and devotion in the observance of
 which and the duty of the superior court in said time is
 required.

THE COURT.

ORDERED THAT THE COURT DO AS IT THINKS FIT.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at the City of New York, this 11th day of May, 1901.

JOHN W. WALKER, Clerk of the Court.

ALBANY, N. Y., May 11, 1901.

THE COURT.

ORDERED THAT THE COURT DO AS IT THINKS FIT.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at the City of New York, this 11th day of May, 1901.

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JOHN W. WALKER, Clerk of the Court.

35613

NORTH AMERICAN TRUST COMPANY,
a Corporation.

vs.

HARRISON PARKER et al.

SAMUEL FRANK, Receiver,
Appellee.

vs.

ILLINOIS VALLEY TRUST COMPANY,
Appellant.

INTERLOCUTORY

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

264 I.A. 625²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the Illinois Valley Trust Co., from an order entered restraining the auditor of public accounts from disposing of 80 State of Illinois 4% Highway bonds deposited with him by the North American Trust Co., pursuant to the provisions of section 350, chapter 32, of the statutes of Illinois.

The order was entered upon a petition of the receiver of the North American Trust Co., and it is urged for reversal that this order appointing the receiver is void because the pleadings upon which he was appointed were not properly verified. On July 18, 1931, the present receiver became the successor of another who was appointed on June 26th and who thereafter resigned. No appeal has been taken from either one of these orders, and it is clear that the validity thereof cannot be questioned collaterally, even if it is conceded that the order of appointment is erroneous. In Christian Hospital v. The People, 223 Ill. 244, where an appellant questioned the validity of an injunction for a similar reason, the court said:

"If the court erred in granting the writ or in not requiring notice the writ was nevertheless binding upon the defendants until its dissolution or until reversed by a higher court."

We hold the same rule is applicable where, as here, an order is

1900

Handwritten signature and initials.

ILLINOIS VALLEY TRUST COMPANY

AT

CHICAGO, ILLINOIS

BEFORE ME, Notary Public in and for the State of Illinois, on this day of

1900

ILLINOIS VALLEY TRUST COMPANY, a corporation organized under the laws of the State of Illinois, do hereby certify that

ILLINOIS VALLEY TRUST COMPANY
CHICAGO, ILLINOIS

284 I.A. 682

MR. JUSTICE KATZMANN DELIVERED THE OPINION OF THE COURT.

This appeal is by the Illinois Valley Trust Co., from an order entered restraining the auditor of public accounts from disposing of the assets of Illinois Valley Trust Co., pursuant to the provisions of Section 284, Chapter 22, of the Statutes of Illinois. The order was entered upon a petition of the receiver of the Illinois Valley Trust Co., and it is upon the return of this order appointing the receiver as well because the allegations upon which he was appointed were not properly verified. On July 18, 1900, the present receiver became the successor of another who was appointed on June 20th and who thereafter resigned. He appears not to have taken from either one of these orders, and it is clear that the validity thereof cannot be questioned collaterally, even if it is conceded that the order of appointment is erroneous. In *Illinois Valley Trust Co. v. The Receiver*, 228 Ill. 244, there is no dissent mentioned and neither is there any suggestion for a similar result. The court will:

"Of the court there is granted the writ as it was requested and the writ was never before granted upon the same facts. The dissenting is easily reversed by a higher court."

It will be seen that the rule is applicable where, as here, an order is

entered appointing a receiver. 23 R.C.L., Sec. 44.

It is next urged that the injunction order here appealed from is void because supported only by the affidavit of the receiver, and Ruprecht v. Henrici, 113 Ill. App. 396, and Peabody v. New England Water Works Co., 80 Ill. App. 458, are cited in support of this contention. These cases are not analogous. In substance, Ruprecht v. Henrici holds that the appointment of a receiver amounts to granting affirmative relief and that such relief cannot be granted unless the order is supported by appropriate pleadings. An answer in a foreclosure proceeding was there held insufficient to support such an order. Peabody v. New England Water Works Co. holds that a receiver may not sue without permission of the court. Here there were two bills of complaint which were consolidated into one case and an intervening petition which by order was allowed to stand as a supplemental bill. These prayed for affirmative relief. As we understand it, it is not an unusual practice after the filing of a bill to file a petition setting up supplementary and specific facts which would justify the appointment of a receiver or the issuance of an injunction, and it is not necessary in such case that the petition should contain all the formal parts of a bill in equity. There was an abundant showing made here of facts authorizing the chancellor in his discretion to issue an injunction which would hold matters in statu quo until the cause could be heard upon the merits. Loelling v. Foster, 180 Ill. App. 133; McDonnell Co. v. Woodh, 247 Ill. App. 170. Moreover, neither the North American Trust Co., nor any stockholder thereof, nor the auditor, complains.

For the reasons indicated the order is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

entered appearing a receiver. 25 N.E. 11, Dec. 11.

It is not stated that the information that was re-

ceived from the said receiver was reported only by the affidavit of the receiver, and that the receiver, the bill was not made.

New England Water Works Co., 30 N.E. 11, Dec. 11, 1888, was cited in

support of this contention. Those cases are not analogous. In

the case of Worcester v. Board of Aldermen, the receiver held that the appointment of a

receiver amounted to granting affirmative relief and that such

relief cannot be granted unless the order is supported by appropriate

evidence. An answer in a receivership proceeding was there held in-

admission to support such an order. Worcester v. Board of Aldermen

Worcester Co. holds that a receiver may not be appointed without a showing of

the court. There were two bills of complaint which were con-

solidated into one and an intervening petition which by order

was allowed to stand as a supplemental bill. There was no order for af-

firmative relief. As we understand it, it is not an unusual prac-

tice after the filing of a bill to file a petition seeking an

affirmative relief. It is not a petition seeking an

appointment of a receiver or the issuance of an injunction, and it is not

necessarily in such cases that the petition should contain all the

material facts of a bill in equity. There was no showing showing

made here of facts authorizing the appointment of a receiver in his petition to

show an information which would hold matters in quo and until the

case was decided by the court. Worcester v. Board of Aldermen, 25 N.E. 11.

25 N.E. 11; Worcester v. Board of Aldermen, 25 N.E. 11, Dec. 11, 1888.

Notice was given to the receiver, and the receiver was appointed.

Not the receiver, however.

Not the receiver, however the order is affirmed.

34923

WALTER SNOPEK,

Appellee,

v.

CHICAGO, MILWAUKEE, ST. PAUL &
PACIFIC RAILROAD COMPANY,

Appellant.

48
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

264 I.A. 625³

Opinion filed Jan. 20, 1932

MR. PRESIDING JUSTICE NEBEL delivered the opinion
of the court.

This is an action brought under the Federal Employers
Liability Act to recover damages for personal injuries received by
the plaintiff at Milwaukee, Wisconsin, on June 18, 1929, while in the
employ of the defendant. Judgment in the sum of \$17,500 was entered
on a verdict of the jury, and from this judgment the defendant
appeals.

At the conclusion of the evidence the court, on
motion of the defendant, withdrew from the consideration of the jury
count 1 and additional count 2, and the case was tried on count 3
and additional count 1. Count 3 charged that the defendant care-
lessly and negligently caused certain cars upon which the plaintiff
was riding in the performance of his duty, to be propelled over
certain tracks and to collide with certain other cars, of the
presence of which other cars the defendant had notice. Additional
count 1 charged that at the time of and prior to the day of the
accident it had been the custom of the defendant when causing cars
to be switched and moved over said tracks, to give notice and
warning to the defendant's employees and other persons of such
movement, but that on the day in question the defendant failed to
give proper notice and warning, and that by reason of the said
negligence of the defendant the collision occurred, resulting in

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Opinion filed Jan. 27, 1933

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the plaintiff's injury. The accident occurred about 4:30 p.m. on June 18, 1929. The plaintiff, a switchman, was acting as field man in his crew, and started to work at 3 p.m. on that day. The yard in which the accident happened is located between Greenfield and Maple Avenues in Milwaukee, just east of the main line of tracks of the Chicago, Milwaukee, St. Paul & Pacific R. R. Co., and is known as the Pere Marquette ferry yard. Between the yard and Lake Michigan is located the plant of the Milwaukee Gas & Coke Company. Just south of the coke plant is the Pere Marquette Railroad dock. The tracks in the switch yards run north and south and are parallel with the main line tracks. The yard tracks are connected with tracks located on the coke plant property by a lead track and at the south end of the yard the tracks curve to the east to serve the Pere Marquette Railroad dock. There are six north and south tracks in the yard numbered from the west to the east 1, 2, 3, 4, 5, and 6. The first five are located on railroad property, and the sixth track is located on coke plant property. There are switches connecting the tracks at the north end of the yard as well as at the south end.

At the southerly end of track 2 is a switch known as No. 2 switch, and from this switch a track curves to the southeast and connects with a track on the coke plant property running to the east at a distance of approximately 400 feet where it then curves to the north and runs back of the coke plant buildings. This curved track running from Number 2 switch to the coke plant property is referred to in the evidence as "the coke plant lead," and from this track, connections by switches are made to tracks 3, 4, 5 and 6. 5 and 6 switches are located 431 feet from switch No. 2. There is a slight grade in No. 3 track and the coke plant lead descending toward the coke plant property. The grade is 12 feet in 1,300 feet and No. 3 switch is about one-half per cent grade higher than the

level point of the track by the quenching plant, one of the buildings on the coke plant property. The coke plant buildings are located just east of the track known as the No. 6 track. Immediately south of the coke buildings is a track known as the "scale track," and south of the scale track is the track on the coke plant property which runs east and west, and is the one that connects with the tracks in the railroad yard.

The movement of the cars which resulted in the accident was a switching movement in the yard. Snopek, the plaintiff, had been employed by the Railroad Company for about eight years, and worked in this particular yard about two years off and on. He was foreman of a switching crew for about six months prior to the accident and up to the previous day. The day of the accident the crew, under Barber as foreman, went to work at 3 o'clock p.m. and the plaintiff was acting as field man. The crew consisted of an engineer, fireman, head man, field man and the foreman. After the crew went to work the first movement was to shove some cars into the old Pere Marquette yard, which is at the south end of the yard described and to the east toward Lake Michigan. Snopek, the field man, rode the leading car and when he reached the point where the cars were to be stopped, he gave the stop signal to the foreman who was with the engine. The cars were stopped, the engine was out off and then Barber, together with the head man, rode the engine north to the north end of track No. 1. The engine, headed north, was then backed over a switch connection and coupled to the north end of a string of cars standing on track No. 2. While the engine was being moved to the north end of this string of cars, Snopek walked from the point where he had stopped the cars in the first movement, to the south end of the string of cars to which the engine was being coupled.

There were 29 cars in this cut on track No. 2, and their disposition was the next work of the crew. No member of the

crew knew what was to be done with them and Barber, as foreman, could determine only by checking them where they were to be switched.

After Barber, on the engine had reached the north end of this cut of cars, he walked from that end along the east side to the south end of the cars. Some of the cars were carded and by a number on the card the foreman determined where each was to be switched. The destination of each of the cars was designated, except on the most southerly nine cars. These cars had no cards and were what are called "hold" cars; that is, they were cars which had not been billed out and were not ready to be switched for movement in trains. On his arrival at the south end of the cars after checking them, he met the plaintiff, who had just arrived there, having walked from the south end of the yard. Barber was foreman of the defendant's crew, and had been employed with switching crews in this particular yard before this time. In switching the cars on defendant's track it became necessary to get these "hold" cars out of the way. Barber, the foreman, informed the plaintiff that he intended to place these "hold" cars on the coke plant lead, and instructed plaintiff to set the brakes on the end cars, in order to prevent them from rolling. In pursuance of said instructions by the foreman, the plaintiff proceeded toward the coke plant to line up switches 5 and 6 for his train. While at that point, he looked down^{toward} the coke plant to see that the way was clear, and then proceeded toward the train, which was still standing on track No. 2. It required from a minute and a half to three minutes for him to get back to the end of the train. The foreman got upon a car standing on the track near No. 2, where he could pass signals to the engineer in charge of the train, and at the same time watch the cars as they proceeded toward the coke plant. The foreman from where he stood ^{not} could see into the coke plant yard on account of the curve in the track and the obstructions beside it.

grow knew what was to be done with them and Fisher, as foreman,
could determine only by guessing from where they were to be collected.
After Fisher, as the engine had reached the water and
of this out of care, he walked from that end along the west side to
the north end of the cars. Some of the cars were loaded and by a
number on the east the foreman determined there each was to be
attached. The destination of each of the cars was designated, except
as the most southerly nine cars. These cars had no loads and were
what are called "hold" cars; that is, they were cars which had not
been filled out and were not ready to be attached for movement in
train. On his arrival at the south end of the cars after checking
them, he met the plaintiff, who had just arrived there, having
walked from the south end of the yard. Fisher was foreman of the
plaintiff's crew, and had been employed with defendant's crew in this
position for some time. In attaching the cars on the
and a train is made necessary to get these "hold" cars out of the
way. Fisher, the plaintiff, followed the plaintiff to the location
to place these "hold" cars on the side about level, and instructed
plaintiff to get the brakes on the end cars, in order to prevent them
from rolling. In compliance of said instruction by the foreman,
the plaintiff proceeded toward the cars which he was to attach
2 and 3 for his train. While at that point, he looked toward
some point to see that the way was clear, and then proceeded toward
the train, which was still standing on track No. 2. It required
from a minute and a half to three minutes for him to get back to
the end of the train. The foreman got upon a car standing on the
track near No. 2, where he could see plainly to the engine in
charge of the train, and at the same time watch the cars as they
proceeded toward the engine. The foreman then went to track
No. 2 and saw that the cars were not to be moved to the north in the

While the plaintiff was walking back to his train, but before he had gotten to it, the foreman gave a signal to go ahead. Before the plaintiff had reached the train the cars started up. He boarded one of the cars and began setting the brakes. Barber, the foreman, heard the exhaust of a coke plant engine at the time the train started up, but before the plaintiff had gotten upon the cars, it sounded to Barber as though the engine were coming closer. He testified that he knew that the Coke Company engine was in the yard and that it might be on the same lead. He knew that the plaintiff was not flagging ahead of the train, but knew that plaintiff was engaged in setting the brakes and was facing east. He permitted the train to proceed around this curve into the coke plant until he saw a train being shoved by the Coke Company engine around this curve into the defendant's yard. He saw a car coming from the coke plant and immediately gave the "washout" sign, or the stop sign. The result was a collision between the train operated by the Coke Company and the train upon which the plaintiff was riding. The plaintiff was thrown from the top of one of the cars and received injuries.

These are substantially the facts, from the evidence in the record.

It is earnestly contended that the trial court erred in denying the defendant's motion that the jury be instructed to return a verdict of not guilty, and upon this motion the defendant seeks to apply the rule of law that an employee assumes all the ordinary risks incident to his employment and extraordinary risks when such risks are known and appreciated, or should be known and appreciated by him. This rule is not disputed by the plaintiff. The question therefore arises; Does the application of this rule to the facts bar the plaintiff's right to recover under the terms and provisions of the Federal Employers' Liability Act? This will be answered upon a consideration of the evidence.

[illegible]

There is no conflict in the evidence as to the experience of the plaintiff as a switchman and his familiarity with the freight yards where the accident occurred. Mr. Barber, the foreman of the defendant's crew, had also been employed prior to this accident with switching crews in this yard, and was familiar with the yard conditions.

The accident occurred from a switching operation of "hold" cars on the Coke Company's lead track. The "hold" cars on the defendant's track had not been billed to any destination, and in order that the balance of the 23 cars which were in the train on the defendant's track could be moved, Barber, in charge of the switching crew, informed the plaintiff that he intended to place these "hold" cars upon the track that lead into the Coke Company's plant, and instructed the plaintiff to line the switches and to set the brakes on the cars, to prevent rolling after they had been moved. When Barber permitted these "hold" cars to be shoved upon the Coke Company's lead track, and while the plaintiff was carrying out the orders of his superior, he knew that the Coke Company's switch engine was on these tracks; heard it coming, and knew that it was coming nearer from the noise of the exhaust steam from the locomotive. It was Barber's duty after this knowledge to have promptly stopped the movement of his train.

Nevertheless, he took no precaution but permitted his train to be shoved over this track and gave no signal or warning to the plaintiff, and did nothing to prevent the collision until just at the moment he saw the cars of the Coke Company plant approaching around the curve. At the time of the collision, the plaintiff was on the cars and facing east, with his back to the Coke Company plant train, carrying out the orders of the foreman, when he was injured.

There is no conflict in the evidence as to the

existence of the plaintiff as a witness and his testimony with
the facts that were the subject of the testimony. The witness, the
foreman of the defendant's crew, had also been suggested prior to
this hearing and nothing more in this case, and was familiar
with the facts.

The witness testified that a witness testified at
"Holt" case on the 10th day of the month. The "Holt" case on
the defendant's trial was not called to the witness, and in
order that the witness of the 10th day was in the case on the
defendant's trial could be called. It was in the case on the
10th, and the witness testified that he was in the case on the 10th.

and was not called into the case on the 10th, and
testified the plaintiff to him the witness and in the case
on the 10th, he was not called after they had been called. Then
before he was called "Holt" case so he was not called on the 10th.
Holt's case was called, and while the plaintiff was called and the other
of his counsel, he knew that the Holt Company's witness was
in the case. He was called, and he knew that it was called before
the 10th day of the month after the 10th day. It was
Holt's case after this testimony as to the witness's testimony the
movement of the case.

Nevertheless, he took no objection and testified
the case he was called after this case and gave no objection as to
the plaintiff, and did nothing to prevent the witness from
testifying at the moment he saw the case of the Holt Company. Then
testifying around the case. At the time of the testimony, the
plaintiff was in the case and testified, and the case was the case
Holt's case, and the case of the Holt Company, and
he was called.

The plaintiff assumed the risks incident to his employment, but he did not assume the risk of a failure of Barber to take proper precaution when he ordered the cars shoved on to the Coke Company's plant tracks, and it does not appear from the record that the plaintiff had knowledge that this switch engine of the Coke Company was coming out of the yard on the same lead as the one on which the defendant cars were moving and on which the plaintiff was applying the brakes. The defendant, by its agent, is chargeable with notice of the approaching of the Coke Company's cars at the time the train under Barber's control, started to move back on to this lead. From the evidence, the plaintiff did not assume this risk, but the accident was caused by the negligence of the foreman in failing to take steps to avoid the collision, and the trial court was warranted in denying the motion of the defendant to find the defendant not guilty.

There is no conflict in the evidence that the plaintiff and the defendant were engaged in Interstate Commerce and subject to the provisions of the Federal Employers' Liability Act, but the defendant contends that if Barber was negligent in notifying the Coke Company's switching crew of the approach of defendant's train, the plaintiff knew of that fact and assumed the risk. The answer to this contention is that Barber ordered the plaintiff to set the brakes on the cars while he, Barber, was in a position on top of the car on the adjoining track between the curves, and could have prevented the collision, but failed to take steps to do so until too late.

It will not be necessary to refer again to the facts under consideration in this opinion, except to note that the facts as set forth in the record were before the jury, and that the trial court could not say, as a matter of law, that the evidence of the plaintiff did not establish negligence, as charged. The following

The Plaintiff accused the State Defendant of having
negligent, but he did not assume the risk of a failure of defense to
the State Defendant when he entered the case. He was not to be
held for any of the State's negligence, and it does not appear from the record
that the Plaintiff had knowledge that this action against the State
was being out of the way on the same level as the one
on which the defendant also was moving and on which the Plaintiff
was moving. The Plaintiff, in moving
this with notice of the apprehending of the State Defendant's
at the time the train under defense's control, started to move
on to this track. From the evidence, the Plaintiff did not assume
this risk, but the accident was caused by the negligence of the State
and in failing to take steps to avoid the collision, and the trial
court was warranted in denying the motion of the defendant to find
the defendant not guilty.

There is no conflict in the evidence that the plain-
tiff and the defendant were engaged in interstate commerce and
subject to the provisions of the Federal Employers' Liability Act.
Nor the defendant contends that its driver was negligent in handling
the case company's delivery van at the time of defendant's
negligence. The plaintiff knew in 1941 that the defendant was not
insured for this negligence. It is not material for plaintiff to
show the brakes on the car while he, driver, was in a position to
stop of the car on the adjoining track between the cars, and would
have prevented the collision, but failed to do so as he was

It will not be necessary to refer again to the same
under consideration in this section, which is the same
as the one in the report with reference to the first
part of the evidence of the witness of the
evidence of the witness, as stated. The following

cases are authorities which support the conclusion reached by this court:

Devine v. G. R. I. & P. Co., 386 Ill. 248, affirmed by the Supreme Court of the United States, 339 U. S. 58, and in which the Court said:

"What has been said disposes of the contention that the plaintiff could not recover because the accident was the result of an ordinary risk of the employment of the deceased. Under the Federal Employers' Liability Act, the fellow servant doctrine was not available as a defense, and if the accident was caused by the negligence of the engineer in suddenly stopping the train with unnecessary violence, the deceased did not assume the risk of such negligence."

Chesapeake & Ohio v. Beattley, 241 U. S. 310, wherein the Court said:

"It is insisted that even conceding the train was operated at a negligent rate of speed, in view of plaintiff's purpose to board it, yet he assumed the risk of injury involved in the attempt. The Act of Congress, by making the carrier liable for an employee's injury, 'resulting in whole or in part from the negligence of any of the officers, agents or employees' of the carrier, abrogated the common law rule known as the fellow servant doctrine by placing the negligence of a co-employee upon the same basis as the negligence of the employer."

Erie R. R. Co. v. Farnsaker, 244 U. S. 321, in which the Court affirmed this rule. The Court said:

"Under such circumstances the injured man would not assume the risk attributable to the negligent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in the situation would have observed and appreciated it."

G. R. I. & P. Ry. Co. v. Ward, 352 U. S. 18, in which case the Court, in passing upon a question of a negligent switching operation in which the plaintiff in this case, a switchman, was injured, said:

"The situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury. * * * It was a sudden emergency brought about by the negligent operation of the particular out of cars and not a condition of danger resulting from the master's or his representative's

negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed had opportunity to know and appreciate it, and thereby assume the risk."

It is further contended that in giving Instruction No. 5 for the plaintiff the court erred in failing to incorporate therein the rule of assumed risk. This instruction to the jury is in the words of the statute and relates to the question of damages. If other instructions fully instructed the jury upon the law in the case, then there is no ground for complaint. Devine v. E. P. I & P. R. R. Co., 268 Ill. 243.

It appears that the jury was instructed by the trial court to the effect that the plaintiff is required to prove his case by a preponderance of the evidence and that the defendant is not liable for a mere accident. The court further instructed the jury that the defendant was under no obligation to warn the plaintiff of dangers which were obvious and that plaintiff assumed all the ordinary risks and dangers incident to his employment; and further when a man of experience undertakes to do work of a hazardous nature the law imposes upon him the duty of exercising care for his own safety in proportion to the dangers that are known to him in the performance of his work.

It further appears that the court by its instruction advised the jury that the defendant is not an insurer of the safety of his employees, and in law is only required to furnish a safe place to work; that the law does not exact of a railroad company that its servants should be all the while upon their guard against dangers not reasonably to be expected. Nor that such companies shall conduct their business with a degree of caution that would prevent a practical operation of their roads.

It would appear from the instructions that the trial court did call the jury's attention to the law applicable to this case, and by doing so seems to have covered the objection called to our attention.

It appears that the jury was instructed by the court to find the defendant guilty if the evidence was such that the jury believed beyond a reasonable doubt that the defendant was guilty of the crime charged. The court further instructed the jury that the defendant was under no obligation to come to the witness stand and testify, and that the jury should not draw any inference from the defendant's failure to testify. The court also instructed the jury that the defendant's failure to testify was not evidence of guilt, and that the jury should not consider the defendant's failure to testify in its deliberations. The jury returned a verdict of guilty.

It would appear that the investigation into the case of the missing person is still in progress. The police are working to identify the person and determine the circumstances of the disappearance. The investigation is ongoing and the police are keeping the public informed of any developments.

Refused Instruction No. 3, offered by the defendant, is to the effect that if the plaintiff just prior to the accident violated any rule of the company, and he suffered injuries solely because of such violation, then he was not in a position to recover. The question is, was the instruction warranted by the issues and the facts. The plaintiff was carrying out the orders of the foreman in braking the "hold" cars that were being switched at the time of the accident. He certainly was in no position of danger and did not suffer injuries because of the violation of a rule. He was injured because the defendant failed to control the movement of the train.

The fourth refused instruction offered by the defendant, was to the effect that the plaintiff assumed all of the ordinary risks and dangers incident to his employment, and such other risks and dangers which were open and obvious and known to and appreciated by the plaintiff. This instruction was covered by the defendant's instruction No. 6, also No. 7, which relates to work of a hazardous nature and the duty of exercising care in proportion to the dangers.

The error complained of by the defendant in the giving and refusing of the instructions is not such as would justify this court in reversing the judgment.

The remaining question before us is that of excessive damages. It appears from the evidence that the plaintiff suffered an injury to his right wrist, which left the semilunar bone out of position, which had caused a restriction in the movement of the fingers and of the wrist; that the condition is permanent, and that the plaintiff cannot use this hand where heavy moving is required or rotary movement of the hand is necessary.

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between of such violation, then he was not in a position to recover.
The question is, was the instruction ...
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as stated the facts were that ...
the evidence, the plaintiff was ...
not ...
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The fourth ...
defendant, was to the effect that the plaintiff ...
ordinary risks and dangers incident to his employment, and was ...
about risks and dangers which were not ...
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giving and ...
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The remaining ...
dangerous. It appears from the evidence ...
on injury to his right wrist, which left the ...
position, which had caused a ...
...
...
...

The plaintiff is 32 years old, and had been earning from \$6.62 a day as a switchman to \$7.14 a day when acting as foreman. His monthly earnings ranged from approximately \$132 a month to a maximum of \$200 a month. At the time of the accident the plaintiff was thrown from a moving box car to the ground, and since that accident he has had headaches and a dull pain in his back.

We are unable to say from this record that the damages were excessive. The jury and the trial court were in a better position than this court to judge of plaintiff's physical condition as it appeared before the jury. The judgment will be affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, J.J. CONCUR.

The defendant is in good health, and has been working
from 1942 to 1944 as a collector of waste & scrap metal in
the district. His monthly earnings ranged from approximately \$100 to
\$150. He is a member of the U.S. Navy. In the form of the defendant
the defendant was known from a court case in the district, and
also from a statement by one of his neighbors who said that he was
a party.

On the 10th of May 1944 the defendant was arrested and
charged with conspiracy. The jury had the usual verdict in a
criminal case. The defendant was found guilty of conspiracy to
violate the Espionage Laws. The defendant was found guilty of
conspiracy to violate the Espionage Laws. The defendant was found
guilty of conspiracy to violate the Espionage Laws.

VERDICT: GUILTY.

VERDICT: GUILTY.

34936

NUMBER FIVE WITCH KITCH INN EAT-HER-YE
(eaterie) a corporation,

(Complainant Below),

v.

GABRIELLE S. BOGNAR, LIEPOLD & HICKS, INC.,
a corporation, and JACOB ALEXANDER,

(Defendants Below),

GABRIELLE S. BOGNAR (Cross Complainant
Below),

Appellee,

v.

ILLINOIS WITCH KITCH INN CORPORATION, a
corporation, LIEPOLD & HICKS, INC., a
corporation, JACOB ALEXANDER and
ERNEST REICH,

(Cross Defendants Below).

On Appeal of ERNEST REICH,

Appellant.

APPEAL

FROM

SUPERIOR

COURT,

COOK

COUNTY.

264 I.A. 625⁴

Opinion filed Jan. 20, 1932

MR. PRESIDING JUSTICE NEBEL delivered the opinion
of the court.

This is an appeal by Ernest Reich, cross-defendant,
from a decree entered in the Superior Court of Cook County in favor
of Gabrielle S. Bognar, cross-complainant, in the sum of \$1600.

The record discloses that Number Five Witch Kitch Inn
Eat-Her-Ye, a corporation, filed a bill for specific performance
against Gabrielle S. Bognar, Liepold & Hicks, Inc., a corporation,
and Jacob Alexander, defendant, praying that relief may be granted
to compel Gabrielle S. Bognar to specifically perform and carry
out an agreement entered into by her under which she was to assign
a lease on premises at 1552 Howard Avenue, Chicago, Illinois, to
the complainant, and that Liepold & Hicks, Inc., and Jacob Alexander
be restrained from transferring or assigning said lease except to

THESE TWO CASES ARE THE ONLY TWO
(continued)
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RECEIVED BY THE COURT, JANUARY 10, 1932
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2014-100

Opinion filed Jan. 20, 1932

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of the court.

This is an appeal by appeal which, even-then, from a decision rendered in the Superior Court of Cook County in favor of Catherine D. Bogner, trust-recipient, in the sum of \$1000.

The second defendant filed answer five days after the first answer, a corporation, filed a bill for specific performance against Catherine D. Bogner, trustee, and a corporation, and James Alexander, defendant, saying that said bill was granted to compel Catherine D. Bogner to execute a certain deed and that the same was granted by the court in the sum of \$1000. The defendant, and that said bill was granted by the court in the sum of \$1000. The defendant, and that said bill was granted by the court in the sum of \$1000.

the complainant; that Gabrielle S. Bognar be required to pay her subscription for stock of the complainant corporation; and for damages.

The defendant, Gabrielle S. Bognar, filed an answer to the bill of complaint, and thereafter filed a cross-bill charging that she had signed the agreement to assign the lease in question and to pay for said stock, but did not know the meaning of the words, "corporation", "stock," or "shares;" that she took possession of the premises described in the lease and conducted the business; that Ernest Reich threatened to ruin her business and coerced her into signing a contract to sell the business to the Illinois Witch Kitch Inn Corporation, for \$1800, and that he took possession without paying any cash or stock; that the contract providing for the purchase of her business in exchange for \$1800 of the stock of the Illinois Witch Kitch Inn Corporation, is null and void; and prays for cancellation of the contract and that Ernest Reich be required to pay damages; that the Number Five Witch Kitch Inn Kat-Mer-Ye, a defendant under the cross-bill, filed an answer charging that the cross-complainant failed to assign the lease; that on or about June 26, 1939, the cross-complainant abandoned the premises; that the landlord, Alexander, took possession for a failure to pay the rent; that Albert Pick-Barth Company, Inc., a corporation, foreclosed its chattel mortgage on the furniture and fixtures, and purchased the same at a sale. Thereafter Albert Pick-Barth executed a bill of sale for all of the fixtures to the defendant Number Five Witch Kitch Inn Kat-Mer-Ye, a corporation, complainant and cross-defendant.

Liebold & Hicks, Inc., and Jacob Alexander, cross-defendants, answered by charging that the cross-complainant failed to pay the rent, and surrendered the premises to these cross-defendants on July 27, 1939, and that thereafter a lease for the premises was

the complaint; that Gabrielle L. Rogers be required to pay her
contribution for stock of the complainant corporation; and for
costs.

The defendant, Gabrielle L. Rogers, filed an answer
to the bill of complaint, and thereupon filed a cross-bill charging
that she had signed the agreement to assign the issue in question
and to pay for said stock, but did not know the contents of the same
"corporation", "stock", or "shares"; that she took possession of
the premises described in the lease and conducted the business;
that she had threatened to ruin her business and caused her
husband to sell the business to the Illinois stock
exchange corporation, for \$1000, and that he took possession of the
same; that the contract providing for the sale
of her business in exchange for \$1000 of the stock of the
Illinois stock exchange corporation, is null and void; and that
for cancellation of the contract and that she be required
to pay damages; that the husband filed with the Illinois stock
exchange corporation the cross-bill, filed an answer charging that the
cross-complainant failed to assign the issue; that on or about June
10, 1917, the cross-complainant abandoned the contract; that she
thereupon took possession for a failure to pay the same;
that she thereupon sold the same to the Illinois stock exchange corporation
for \$1000 on the terms and conditions, and proposed the
same as a sale. The Illinois stock exchange corporation sold the
same for all of the stock to the Illinois stock exchange corporation.
The defendant, Gabrielle L. Rogers, and her husband, cross-
complainant, proposed by answer that the cross-complainant failed
to pay the same, and requested the plaintiff to show evidence
to pay the same, and that she be required to pay the same.

executed and delivered, to the complainant and cross-defendant, Number Five Witch Kitch Inn Kat-Mer-Te, a corporation.

The other defendants, Illinois Witch Kitch Inn Corporation and Ernest Reich denied the charges in the cross-bill, but admitted that the agreement between the cross-complainant and this cross-defendant Illinois Witch Kitch Inn Corporation was never acted upon, due to the failure of the cross-complainant to comply with the bulk sales law of the State of Illinois.

A hearing was had before the Chancellor, and upon the trial, the complainant to the original bill offered no evidence. The hearing proceeded upon the cross-bill and the several answers filed to this bill. Evidence was offered by the parties, and after a full hearing, the court found that the cross-defendant Reich was guilty of the several acts set forth in the findings of the court, and entered a money decree against this cross-defendant.

On this appeal the cross-defendant, Ernest Reich, contends that the evidence does not show any false representations on the part of this cross-defendant, or that any of the cross-defendants in this case at any time interfered with the conduct of cross-complainant's business.

Passing upon these contentions there is one really important question that the court will necessarily consider, and that is whether or not the cross-complainant^{was} coerced by the cross-defendant Reich to enter into the contract, the subject of this litigation, through a duress of property, and thereby obtained the cross-complainant's property, and does the rule apply which is stated by this court in the case of Rees v. Schmits, 164 Ill. App. 280, in these words:

"Notwithstanding the complainant was not actuated by an apprehension of imminent danger to his life, limb or liberty, which element is essential to constitute a duress of person, it is manifest that he was coerced to

act through what is characterized as duress of property or moral duress, which overcame his free agency, and which equally with duress of person, entitled him to recover back the money paid by him under such influence. Duress of this character has been recognized by the courts of this state in the following cases: *Spaide v. Barrett*, 57 Ill. 289; *County v. Simons*, 5 Gilm. 513; *Thurman v. Burt*, 53 Ill. 139; *City v. Sperbeck*, 89 Ill. App. 562; *Pemberton v. Williams*, 87 Ill. 15; *C. & A. R. R. Co. v. Coal Co.*, 79 Ill. 121; *Pub. Co. v. Ass. Press*, 114 Ill. App. 241; *Prickett v. Madison Co.*, 14 Ill. App. 454. Moral duress consists in imposition, oppression, undue influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another; the theory under which relief is granted being that the party profiting thereby has received money, property or other advantage, which in equity and good conscience he ought not to be permitted to retain. *R. Co. v. Coal Co.*, 79 Ill. 121; *Pub. Co. v. Press Association*, 114 Ill. App. 241."

Having this rule in mind, it is necessary to consider the evidence and determine whether the facts in the instant case come well within this rule and support the findings of the court in its decree.

The cross-complainant met Ernest Reich in March, 1929, after answering an advertisement in the *Chicago Tribune* through correspondence, Reich advised her that he was engaging a number of experienced women to operate a chain of sandwich shops. He had a talk with cross-complainant and she advised him that she had \$3,000 to invest. Reich advised her against going into business, because of her ignorance of business methods and customs, but that if she did do so she must have a partner, and in making such investment she should invest only \$1,000, and keep \$2,000 as a reserve. She decided to go into this restaurant business, and a location was found at 1552 Howard Avenue, Chicago, Illinois. The cross-complainant testified that on March 13, 1929, she signed a lease for these premises. The day after the lease was signed Reich stated that he would be her partner in the restaurant business; that a day or two after, Reich took cross-complainant to his lawyer, and had her sign a paper, which she did not read but which she

assumed was a partnership agreement. This paper, in fact, purported to be a subscription by the cross-complainant for 335 shares, at \$10.00 a share, in a corporation to be organized, and that under the terms of the document the Illinois Witch Kitch Inn Corporation, a holding corporation in which Reich owned most of the stock, subscribed for 335 shares, to be paid for by franchises, plans, recipes, etc., and in addition that this Company should at all times have a minimum of 1/3 of the stock without any further payment. The cross-complainant showed this paper to a friend that night and he told her that it was not a partnership agreement. She went to Reich the next day and after a talk he agreed to cancel the paper and call it void. The cross-complainant then equipped a restaurant at the expense of about \$3,000, and in payment therefor used her money. After the restaurant was equipped she continued this business until the latter part of June, 1939. Reich visited her at her apartment soon after the equipment was installed, and demanded \$1500, which she refused to pay. Reich, the cross-defendant, then told this cross-complainant that she should pay or he would make her lose all she had. This conversation took place on or about March 15, 1939. The cross-complainant continued to operate the restaurant until the latter part of June of that year. Reich called at her place of business about June 15, after she had advertised the restaurant for sale, and advised her that she could not sell the place because he owned 1/3 interest, which he obtained by the contract signed at his lawyer's office. He also told that to a Mr. Margraves, who was present in her place of business and interested in the purchase of the restaurant. A few days later, Reich visited Margraves at his place of business and told him that he would get an injunction against the sale and purchase of this property. Margraves testified that he dropped the matter and bought another place; that he thought the restaurant was worth between \$5,000 and \$6,000. On June 31, 1939, a bill for specific

The first thing I noticed when I stepped out of the car was the smell of the sea. It was a salty, bracing scent that I had never experienced before. The air was cool and crisp, a stark contrast to the humid heat of the city I had just left. I looked out over the water, and for a moment, I felt a sense of peace and freedom that I had never known.

The boat was small and simple, but it was perfect for what I needed. I had heard that the fishing was good, and I was determined to try my luck. The captain, an old man with a weathered face and a kind smile, welcomed me aboard. He told me that the boat was named "The Sea Breeze" and that it was the best place to catch the fish. I nodded and thanked him, then I went to the deck.

The deck was made of wood and was clean and well-maintained. There were several fishing rods and nets set up, and I saw that the captain had been successful in his catches. I took a fishing rod and went to the water's edge. I cast my line and waited. The water was calm and clear, and I could see the bottom of the sea. I felt a sense of anticipation as I waited for a fish to bite.

After a few minutes, I felt a tug on my line. I pulled it in and saw that I had caught a small fish. It was a silver fish with a golden eye, and it was beautiful. I held it up and smiled. The captain came over and looked at the fish. He nodded and said that it was a good catch. I thanked him and put the fish back in the water.

I continued to fish for a few more hours, and I caught several more fish. Each time, the captain would come over and look at my catch. He would nod and say that it was a good catch. I felt a sense of accomplishment and pride as I caught each fish. The captain was a good man, and he was a great teacher. He taught me how to fish and how to take care of the fish.

As the sun began to set, the captain told me that it was time to go. I thanked him and said goodbye. I got back in the car and drove home. I felt a sense of peace and contentment that I had never experienced before. I had found a new hobby, and I had met a great man. I was going to come back soon.

performance was filed, making as one of the parties defendant Gabrielle S. Bognar. A few days after receiving a summons Reich was at her apartment, and he then stated that the restaurant would have to be sold to him, as no one else could buy it. After a discussion, Reich finally agreed to pay \$1600, and some time later asked the cross-complainant, in her apartment, to sign certain papers. She was told that she did not need a lawyer, and that the papers contained an agreement to pay her \$1600 in six months. This figure was arrived at from the value of the equipment and fixtures in the store. Nothing was said about 16 shares of stock in a corporation. Reich promised to take possession and assume the unpaid balance due Albert Pick-Barth Company, and the cross-complainant left the next morning for her sister's home in Glen Ellyn on account of ill health.

It developed that Liepold & Nicks, Inc. took possession of the premises as the landlord's agent; after the cross-complainant had turned over possession to cross-defendant Reich; that Reich attended the foreclosure sale by Albert Pick-Barth under a chattel mortgage executed by the cross-complainant, and bid for Albert Pick-Barth, and under that bid Albert Pick-Barth took possession of the property. Soon thereafter No. 5 Witch Kitch Inn took possession of the property by bill of sale from this Company, and possession of the premises under a lease from the landlord. The cross-complainant expended about \$3,000 in this business and never received any sum from the cross-defendant Reich, after he had promised to pay her \$1600 within six months. The cross-complainant was overreached by Reich who acknowledged that she was not experienced in business.

The facts show conclusively that the only money used in this business was the money furnished by the cross-complainant;

[illegible]

Dear your ymo all best wishes and love from all
the family

that cross-defendants, Illinois Witch Kitch Inn Corporation and Reich never contributed one dollar in cash.

The facts as they appear in the record fully sustain the findings of the court that Ernest Reich by means of threats that cross-complainant would lose her entire restaurant and all other property owned by her, fraudulently and with deceitful intent, induced the cross-complainant to sign an instrument purporting to be a bill of sale and assignment of the leasehold, and all the furniture, fixtures and equipment located upon the premises at 1552 Howard Avenue, Chicago, Illinois, after which the cross-defendant took possession. This case comes within the rule cited in this opinion. The cross-complainant was coerced through what is characterized as duress of property, and is entitled to a decree for the value of the personal property used in the restaurant business. The restaurant fixtures used by the cross-complainant in the property were taken possession of by Reich, and thereafter were disposed of by him, and so they cannot be reached by the cross-complainant. Therefore, the only relief that could be granted by the Chancellor was a decree for the reasonable value of such property. But it is urged by Reich that the Chancellor erred in granting relief to the cross-complainant by way of an amount in damages, as this was in violation of the rule that courts of equity do not entertain jurisdiction to merely grant damages for a breach of contract. This general rule is not questioned, but in the instant case the complainant asked that relief be granted to compel the defendant-cross-complainant to specifically perform a certain contract, which related to the business and is the subject of this litigation, and the cross-bill became germane to the original bill when the cross-complainant prayed that said contract be cancelled as prayed for, and that the court determine those personally liable, fix the amount due the cross-complainant and enter a decree therefor.

THE ABOVE IS A TRUE AND CORRECT COPY OF THE RECORD AS IT APPEARS IN THE RECORD BOOK OF THE BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, CALIFORNIA, FOR THE YEAR 1907.

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...This case comes within the rule stated in this opinion.

It is further stated that the above information was obtained from the files of the FBI, and is being furnished to you for your information.

11-10-68

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THE UNIVERSITY OF CHICAGO

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The court by its decree found the amount to be due and that the cross-defendant Reich was liable for that amount. The general rule which applies is one that has been approved by the Supreme Court in the case of Longshore v. Longshore, 300 Ill. 470, in these words:

" * * * but it is a well settled rule that when a court of equity has once obtained jurisdiction upon any equitable ground it will retain it to do complete justice between the parties, although in doing so it will become necessary to establish purely legal rights or to grant legal remedies. (Pool v. Decker, 93 Ill. 507; Keith v. Henkleman, 173 id. 137, 30 Ency. of Pl. & Pr. p. 404.) And if it becomes necessary to grant affirmative relief to the defendant in order to dispose of the matter in controversy and to do complete justice between the parties, we have no doubt a cross-bill may be filed, under which such relief may be granted and the circuitry of action avoided. The entire controversy may, with much less cost and with greater facility, be finally determined in this suit and complete and exact justice done to all the parties. The complainants seem to have made the relief demanded by the cross-bill a part of the subject matter of their bill, and in our opinion the cross-bill is germane."

From the conclusions based upon the reasons found by this court in its opinion, the decrees entered by the court is affirmed.

DECREE AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

34948

HARRY WEINER,

Appellee,

v.

SAMUEL BERNHARD,

Appellant.

50
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 626¹

Opinion filed Jan. 20, 1932

MR. PRESIDING JUSTICE NEBEL delivered the opinion of the court.

This action was instituted in the Municipal Court of Chicago by Harry Weiner and Henry Klein, doing business as Weiner & Klein, plaintiffs against Samuel Bernhard, defendant, to recover the sum of \$100.00 upon a certain check in that amount for services rendered by the plaintiffs. The issues were tried before the court and a jury. During the hearing Henry Klein withdrew as a party plaintiff. Thereupon Harry Weiner, by leave of court, filed an amended statement of claim upon an account stated.

The jury, after a hearing, returned a verdict finding the issues in favor of the plaintiff and assessing the damages at the sum of \$100.00. Upon this verdict the Court entered a judgment for that amount, and subsequently, by agreement of the parties the court vacated the judgment and granted a new trial. The case was again tried before a jury and a verdict was returned finding the issues for the plaintiff and assessing the plaintiff's damages at the sum of \$100.00. Judgment was entered by the court, and from this judgment the defendant appeals.

From the evidence it appears that the plaintiff was an attorney at law, practicing in the City of Chicago, Illinois; that he rendered services as an attorney for the defendant; that about November 6 or 7, 1928, the defendant called upon the plaintiff

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Opinion filed Jan. 20, 1933

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and consulted with him in regard to his financial condition; that the plaintiff with the defendant conferred with one Morris Klein, who was trustee for the benefit of creditors, and also with certain attorneys for some of the creditors of the defendant; that upon advice of the plaintiff the defendant executed an assignment for the benefit of the creditors; that a check for \$100.00 was signed and delivered to the plaintiff for services rendered.

The defendant testified to the effect that he was engaged in the general mercantile business; that he consulted with the plaintiff with reference to a case pending in the Municipal Court of Chicago, wherein the Waring Glove Company was plaintiff and Samuel Berngard was defendant; that the defendant paid for such services, and thereafter again consulted with the plaintiff in regard to his financial condition; that the plaintiff, without informing the defendant as to the nature of the proceeding, induced him to execute an assignment to Morris Klein, as trustee, for the benefit of his creditors; that the defendant visited the office of Carroll Teller, the representative of the Waring Glove Company in the suit pending against the defendant in the Municipal Court of Chicago; that the plaintiff requested the defendant to execute notes payable to the plaintiff in the sum of \$1,000, in order that he, the plaintiff, might file them as a claim against the estate, and agreed that if any dividends were received he would turn them over to the defendant; that the defendant refused to execute the notes; that the check for \$100.00 signed by the defendant at the request of the plaintiff was for the purpose of showing it to the creditors and the trustee, so that plaintiff's services would be paid for by the trustee; that the defendant did pay the plaintiff \$50.00 for services rendered in the preparation of a chattel mortgage and note; and that he was not otherwise indebted to the plaintiff in any sum whatever.

and consulted with him in regard to his financial condition; that the plaintiff with the defendant consulted with one Morris Klein, who was trustee for the benefit of the creditors, and also with certain attorneys for some of the creditors of the defendant; that upon advice of the plaintiff the defendant executed an assignment for the benefit of the creditors; that a check for \$100.00 was signed and delivered to the plaintiff for services rendered.

The defendant testified to the effect that he was engaged in the general mercantile business; that he consulted with the plaintiff with reference to a case pending in the Municipal Court of Chicago, wherein the United Glass Company was plaintiff and defendant; that the defendant was defendant; that the defendant was defendant; and thereafter again consulted with the plaintiff in regard to his financial condition; that the plaintiff, without informing the defendant as to the nature of the proceeding, induced him to execute an assignment to Morris Klein, as trustee, for the benefit of his creditors; that the defendant visited the office of Russell Miller, the representative of the United Glass Company in the suit pending against the defendant in the Municipal Court of Chicago; that the plaintiff requested the defendant to execute notes payable to the plaintiff in the sum of \$1,000, in order that he, the plaintiff, might file them as a claim against the estate, and agreed that if any dividends were received he would turn them over to the defendant; that the defendant refused to execute the notes; that the check for \$100.00 signed by the defendant at the request of the plaintiff was for the purpose of showing it to the creditors and the trustee, so that plaintiff's services would be paid for by the trustee; that the defendant did not deliver the check to the trustee; and that he was in the possession of a check for \$100.00 and note; and that he was not otherwise limited in his testimony in any and whatever.

Two grounds are urged by the defendant for reversal;

(1) That the court during the trial made improper and prejudicial remarks in the presence of the jury; and (2) that the court erred in refusing to set aside the verdict of the jury and grant a new trial.

As to the first ground that the court made improper remarks, we have examined the abstract of record and are unable to find that the defendant at the time of the trial objected to these so-called prejudicial remarks of the court. Not having done so this point cannot be raised for the first time on appeal, and therefore it is not properly before this court.

As to the second ground that the court erred in not granting a new trial, the defendant contends that the verdict is contrary to the evidence. There is a conflict in the evidence which, necessarily, is for a jury to pass upon. The credibility of witnesses is to be determined by the jury and is a factor that enters into the determination of the weight of the evidence. The jury in the instant case having passed upon the credibility of witnesses and determined the weight of the evidence, this court will not interfere unless we can say that the verdict is against the manifest weight of the evidence. We have examined the evidence, and conclude from such examination that the verdict is sustained by the evidence in the record.

It may be noted that the abstract filed by the appellant is not in narrative form, and does not comply with the rule of this court. However, we have considered the merits of the case, and are of the opinion that the verdict of the jury is justified and that the court properly entered judgment.

The judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

Two grounds are urged by the defendant for reversal:
(1) That the court during the trial made improper and prejudicial remarks in the presence of the jury; and (2) That the court erred in refusing to set aside the verdict of the jury and grant a new trial.
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As to the second ground that the court erred in not granting a new trial, the defendant contends that the verdict is contrary to the evidence. There is a conflict in the evidence which, necessarily, is for the jury to pass upon. The propriety of a new trial is to be determined by the jury and is a factor that enters into the determination of the weight of the evidence. The jury in the instant case having passed upon the credibility of witnesses and determined the weight of the evidence, this court will not interfere unless we can say that the verdict is against the weight of the evidence. We have examined the evidence, and conclude from what is established that the verdict is sustained by the evidence in the record.

It may be noted that the abstract filed by the defendant is not in narrative form and does not comply with the rules at this court. However, we have considered the merits of the case, and are of the opinion that the verdict of the jury is justified and that the court correctly refused to grant a new trial.

Very respectfully,
JAMES H. HARRIS, JR.

34959

CHARLES WOLF, JULIUS KAHN and
BENJAMIN WALTZ, doing business
as RADIO INDEX MANUFACTURING
COMPANY,

Appellees,

v.

WILCOX COMPANY, a corporation,
Appellant.

5
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 626²

Opinion filed Jan. 20, 1932

MR. PRESIDING JUSTICE RESEL delivered the opinion
of the court.

This suit is prosecuted by the plaintiffs against
the defendant in the Municipal Court of Chicago to recover damages
for a breach of contract. By agreement, trial by jury was waived
and the cause was submitted to the court, and after a hearing the
Court found the issues for the plaintiffs and assessed the plaintiffs'
damages at the sum of \$1,000. Judgment in that amount was entered,
from which the defendant appeals.

From the record it appears that after the defendant
filed its appearance it moved to strike the plaintiffs' statement of
claim, which motion was allowed. Thereafter, by leave of court, an
amended statement of claim was filed wherein Charles Wolf and Julius
Kahn, doing business as Radio Index Manufacturing Company, were
substituted as parties plaintiff, which statement of claim alleged
the same facts as were contained in the original statement of claim.
Subsequently, on motion, the court granted leave to make Benjamin
Waltz additional party plaintiff and to file an amended statement
of claim instantler. In the second amended statement of claim,
Charles Wolf, Julius Kahn and Benjamin Waltz, doing business as
Radio Index Manufacturing Company allege that the plaintiffs' claim
is for damages for a breach of contract; that the defendant agreed

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WASHINGTON, D. C.

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Opinion filed Jan. 30, 1933

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MR. WASHINGTON: I HAVE NO OTHER MATTER TO PRESENT.

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and the same was submitted to the court, and after a hearing the

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1. 在下列各题中，选择正确的答案，将序号填入括号内。

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WILLIAM HART WELLS, 1900-1970, was a member of the American Academy of Arts and Letters.

1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 26

English adult to nonnative adult, training category as *Interlanguage*

PLEASE DO NOT WRITE IN THESE SPACES. THIS IS A REPRODUCTION OF THE ORIGINAL DOCUMENT.

10-10-68

James H. Scherer is chief of the "Intelligence" group. He is also

of which is shown in the following table.

CHERIE WALT, 1910-1911, 1912-1913, 1914-1915, 1916-1917, 1918-1919, 1920-1921, 1922-1923, 1924-1925, 1926-1927, 1928-1929, 1930-1931, 1932-1933, 1934-1935, 1936-1937, 1938-1939, 1940-1941, 1942-1943, 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2

in writing to purchase 50,000 radio logs at 5 cents each, the plaintiffs agreeing not to sell such logs to any other party engaged in the coal and coke business in Chicago for three months after delivery of the books; that the defendant defaulted in the performance of said contract, and as a result plaintiffs were damaged.

The defendant denied in its amended affidavit of merits that it agreed in writing with the plaintiffs as alleged, and stated that said contract was with the Radio Index Manufacturing Company, an alleged corporation; and also denied that the plaintiffs suffered damages by reason of the non-performance of said contract.

The defense is to the effect that the defendant contracted with the Radio Index Manufacturing Company, and not with the plaintiffs; and also that the plaintiffs did not suffer any damages by reason of the non-performance by the defendant.

The only evidence in the record is that offered by the plaintiffs, which is in substance that the defendant executed a written order addressed to the Radio Index Manufacturing Company, requesting delivery of 50,000 radio index logs at 5 cents each, reserving the right to the exclusive use of the log as an advertising medium in the coal and coke business in Chicago for 3 months after delivery of the books, with an option to extend the exclusive rights by a renewal order, and agreeing to pay \$48 additional for composition of the advertising matter. After the defendant acknowledged the acceptance of the order by the plaintiff, the defendant cancelled its order. The evidence of the plaintiff further shows that plaintiffs were able to produce the radio logs, printed and ready to deliver to the defendant, at a cost of \$26.80 per thousand books. The plaintiffs contend that it would have cost them \$1,440 to produce 50,000 printed books for delivery to defendant, for which the defendant agreed to pay plaintiffs 5 cents for each radio log;

in writing to defendant, 30,000 radio logs at 5 cents each, the plain-
tiff offering not to sell same again to any other party except in
the coal and coke business in Chicago for three months after delivery
of the books; that the defendant obtained in the performance of
said contract, and as a result defendant was damaged.

The defendant denied in its amended affidavit or
verita that it agreed in writing with the plaintiff as alleged, and
stated that said contract was with the Radio Index Manufacturing
Company, an alleged corporation; and also denied that the plaintiff
collected damages by reason of the non-performance of said contract.
The plaintiff is to the effect that the defendant was

frustrated with the Radio Index Manufacturing Company, and that the
plaintiff was also that the plaintiff did not suffer any damages
by reason of the non-performance of the contract.

The only evidence in the record is that offered by
the plaintiff, which is in substance that the balance of executed
a written order addressed to the Radio Index Manufacturing Company,
requesting delivery of 30,000 radio index logs at 5 cents each,

reserving the right to the exclusive use of the log as an advertis-
ing medium in the coal and coke business in Chicago for 3 months
after delivery of the books, with an option to extend the exclusive
rights by a formal order, and offering to pay the additional cost

execution of the advertising matter. After the defendant acknow-
ledged the acceptance of the order by the plaintiff, the defendant
cancelled the order. The evidence of the plaintiff further shows
that plaintiff was sold to produce the radio logs, printed and

ready for delivery to the defendant, at a cost of \$20.00 per thousand
logs. The plaintiff contends that it would have cost them \$1,400
to produce 30,000 printed books for delivery to defendant, for which
the defendant agreed to pay plaintiff 5 cents per radio index log.

that the amount of damages sustained by the plaintiff is the difference between the cost to plaintiffs to produce the books and the amount agreed to be paid for them by the defendant, which difference is \$1,080, the amount of the judgment.

The defendant contends that the making of additional parties plaintiff must be by leave of court. The trial court in the instant case permitted the plaintiffs to file an amended statement of claim, from which it appears that Charles Wolf and Julius Kahn were substituted as parties plaintiff, and leave was thereafter granted to make Benjamin Maltz an additional party plaintiff, all of which was not objected to by the defendant. This contention is technical, and from the record there is no merit to the suggestion. All of the parties interested were before the court, and their rights were adjudicated when the judgment was entered.

The defendant questions the measure of damages adopted by the trial court in arriving at the amount of plaintiffs' damages. We have considered this question and are not in accord with defendant's contention that the court erred in the computation of plaintiffs' damages. The statute of our state entitled, "Bulk Sales Act," (Cahill's Ill. Rev. Stats. Chap. 121a, Par. 67, Sub-div. 4) expressly provides, in part, as follows:

"The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

An instruction assessing damages, and which is the law applicable in the instant case, was expressly approved by the Supreme Court in the case of Kingman & Co. v. Hanna Wagon Co., 176 Ill. 545, and is, in part, as follows:

"The measure of the plaintiff's damages in such case is the difference between what it would cost the plaintiff to make and deliver such wagons and extra boxes and the price which the defendant agreed, in and by its contract, to pay

the plaintiff therefor; and whatever evidence shows the amount of these damages to be, it is your duty to assess the same in favor of the plaintiff."

The court said:

"Appellant contends that the proper measure of damages was the difference between the contract price and the market price at the time and place of delivery. This undoubtedly is the general rule under a contract to deliver goods at a certain price and when the purchaser refuses to accept and pay for them, because the seller may take his goods into the market and obtain the current price for them; yet where, from the nature of the articles there is no market on which the articles can be sold, this rule is not applicable. (Leake's Dig. of Contracts, 1060.)"

The defendant repudiated its contract, and as a result the plaintiffs did nothing further to enhance defendant's damages, and under the facts in this case they are entitled to the profit they would have made if the contract had been fully performed, and such profit should be considered in estimating the amount of the damages. This the trial court did in arriving at the plaintiffs' damages.

The record is free from error and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

The President, Secretary, and members of the Board of Directors of the American Telephone and Telegraph Company are hereby notified that the same is being held in the city of New York.

Very truly yours,

ALFRED W. BRIDGES, President
AMERICAN TELEPHONE AND TELEGRAPH COMPANY
New York, N. Y.

The following is a list of the members of the Board of Directors:

ALFRED W. BRIDGES, President
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

JOHN D. RYAN, Vice President
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

JOHN D. RYAN, Vice President
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

JOHN D. RYAN, Vice President
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

JOHN D. RYAN, Vice President
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

JOHN D. RYAN, Vice President

The Board of Directors of the American Telephone and Telegraph Company is hereby notified that the same is being held in the city of New York.

Very truly yours,

ALFRED W. BRIDGES, President

ALFRED W. BRIDGES, President

34978

MARGARET F. GILPIN and WILLIAM
ROSE, as Executors of the Estate
of JOHANNA FLYNN, Deceased,

Appellants,

v.

HARRY E. DAGGETT,

Appellee.

527
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 626³

Opinion filed Jan. 20, 1932

MR. PRESIDING JUSTICE REBEL delivered the opinion
of the court.

This is an appeal by the plaintiffs from an order vacating a judgment for \$4,500, entered on June 9, 1930, in the Municipal Court of Chicago. The defendant, on October 31, 1930, filed a petition to vacate the judgment, which petition alleges, in substance, that the cause had been pending in the Municipal Court of Chicago since June 30, 1927; that on "December 25," 1927, said cause was placed on the short cause calendar and set for trial on April 2, 1928, and thereafter continued from time to time until January 29, 1929, at which time the cause was stricken from the short cause calendar and ordered placed at the foot of the jury calendar; that at that time the defendant understood the court to order that the case be stricken from the jury calendar, and to be placed back on the jury calendar only upon notice; that when the cause did come up for trial on May 19, 1930, the defendant had no notice or knowledge that said cause was set for trial on June 9, 1930; and that the first knowledge he had that the judgment was entered was on October 23, 1930, when the defendant was served with an execution by the bailiff of the Municipal Court of the City of Chicago.

The defendant's defense to this action pending in the

AMANDA E. WILLIAMS and WILLIAM
HUGHES, as Defendants of the Estate
of WILLIAM HUGHES, deceased.

AMANDA E. WILLIAMS,

Defendant.

34070

Opinion filed Jan. 30, 1933

THE HONORABLE JUSTICE WILLIAM HUGHES, JR.

of the court.

This is an appeal by the plaintiff from an order
reversing a judgment for \$4,000, entered on June 8, 1930, in the
Municipal Court of Chicago. The defendant, on October 21, 1932,
filed a petition to set aside the judgment, which petition alleged,
in substance, that the same had been procured in the Municipal Court
of Chicago since June 22, 1927; that "between June 22, 1927, and
June 22, 1928, on the said cases, judgment was not filed on
April 8, 1928, and thereafter continued from time to time until
January 30, 1930, at which time the cause was withdrawn from the
court calendar and ordered placed at the foot of the jury
calendar; that at that time the defendant withdrew the cause to
order that the cause be withdrawn from the jury calendar, and to be
placed back on the jury calendar only upon notice; that when the
cause did come up for trial on May 12, 1930, the defendant had no
notice or knowledge that said cause was set for trial on June 8, 1930,
and that the latter knowledge he had that the judgment was entered
was on October 21, 1932, when the defendant was served with an
execution by the Sheriff of the Municipal Court of the City of

Chicago.

The defendant's defense to this action pending in the

Municipal Court of Chicago, is that on June 28, 1926, the premises occupied by him were destroyed by fire, and that it was covenanted and agreed in the lease that;

"In case said premises shall be rendered untenable by fire or other casualty, the lessor may at his option terminate this lease, or repair said premises within thirty days, and failing so to do, or upon the destruction of said premises by fire, the term hereby created shall cease and determine;"

that the term created in the lease ceased and determined on June 28, 1926, and that all rents due and owing under said lease have been paid to the plaintiffs.

The plaintiffs, on November 7, 1930, filed their motion to strike the defendant's petition from the files and to dismiss the proceeding to vacate the judgment entered on June 9, 1930, upon the grounds set forth in said motion, which are, in part, as follows:

1. That the petition sets forth no facts entitling the defendant to the relief prayed.
2. That the petition sets forth no fact entitling the defendant to relief under a common law writ of error coram nobis or a bill in equity.
3. That the petition does not set forth a meritorious defense to the plaintiffs' statement of claim.
4. That the allegations of the supposed defense are conclusions of the pleader.
5. That the petition shows on its face that the defendant was guilty of negligence and laches.

Thereafter, on November 17, 1930, after a hearing, the court entered an order vacating the judgment, and it is from this order that appeal by the plaintiffs is before this court.

This action is brought by the plaintiffs as the Executors of the Estate of Johanna Flynn, deceased, and it appears from the statement of claim against the defendant as assignee for rents due under a lease dated March 19, 1923, for the premises ^{described} as

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606 West 67th Street, Chicago, Illinois, and used as a coal yard by the defendant, and that at the time of the filing of the statement of claim there was due as rent \$4500, to which claim the defendant filed his amended affidavit of merits, which is set forth in his petition to vacate the judgment.

It also appears from the record that on June 9, 1930, the defendant's second amended statement of claim and set-off was stricken from the files and an ex parte hearing was had before a jury, which found the issues for the plaintiffs and assessed the plaintiffs' damages at \$4500, and that the court entered a judgment on the verdict of the jury.

The defendant urges that the Appellate Court is without jurisdiction to consider the sufficiency of a petition to vacate a judgment, where the petition is not made a part of the bill of exceptions.

The motion and petition to vacate the judgment in this case under Section 21 of the Municipal Court act stand as a declaration in a new suit, thereby presenting new issues. Central Bond Co. v. Roesser, 323 Ill. 90. The plaintiffs filed a motion to strike such petition upon the grounds set forth. The motion is in effect a demurrer, and admits only averments that are well pleaded, People v. Qmen, 290 Ill. 59, and does not waive substantial defects in the declaration that fail to sustain the final order of the court, C. & A. R. R. Co. v. Clausen, 173 Ill. 100, so that an issue of law was made on the motion to vacate questioning the sufficiency of the motion to support the order entered by the court, which order so entered is final and appealable. Central Bond Co. v. Roesser, supra.

The record proper in this case necessarily consists of the motion, which is the declaration in this proceeding; the motion of the plaintiffs to strike, which is a demurrer questioning the sufficiency of the motion as a matter of law; and the final

608 West 67th Street, Chicago, Illinois, and used as a coal yard by the defendant, and that at the time of the filing of the statement of claim there was no coal yard at 608 West 67th Street, which is not found in his petition to vacate the judgment.

It also appears from the record that on June 8, 1930, the defendant's counsel caused a statement of claim and set-off to be filed from the files and an affidavit was filed before a jury, which found the issues for the plaintiff and assessed the plaintiff's damages at \$4000, and that the court entered a judgment on the verdict in the jury.

The defendant urges that the Appellate Court is without jurisdiction to consider the sufficiency of a petition to vacate a judgment, where the petition is not made a part of the bill of exceptions.

The motion and petition to vacate the judgment in this case under Section 81 of the Municipal Court act stand as a declaration in a new suit, thereby presenting new issues. Central Bond Co. v. Kohnen, 233 Ill. 60. The plaintiff filed a motion

to strike such petition upon the grounds set forth. The motion is to effect a demurrer, and admits only statements that are well pleaded. People v. Green, 350 Ill. 52, and does not raise substantial issues

in the declaration that fail to sustain the final order of the court. U. S. v. Egan, 173 Ill. 100, so that an issue of law was made in the action by virtue of presenting the sufficiency of the motion to sustain the court's order of the court, which motion

is stated in the bill of exceptions. Central Bond Co. v. Kohnen, 233 Ill. 60. The record proper in this case necessarily contains of the action, and is the declaration to this proceeding; the motion of the plaintiff to strike, which is a demurrer questioning the sufficiency of the motion as a matter of law; and the final

order, which is the judgment of the court vacating the judgment. Burke v. C. & N. W. Ry. Co., 108 Ill. App. 565, In re Estate of Martha Janett, 199 Ill. App. 13.

The fact that the plaintiffs asked for leave to file pleas and answers to the defendant's petition, which was denied after the demurrer was overruled, does not waive substantial defects in the declaration. We therefore conclude that it is not necessary that the petition, demurrer and final order be incorporated in a bill of exceptions, but that they are properly included in the Common Law record.

Now as to the sufficiency of the defendant's motion and petition to vacate, which is questioned by the plaintiffs' demurrer. The principal ground for vacating the judgment is that on January 29, 1929, when the case came on for hearing on the short cause calendar it was stricken from that calendar and ordered by the court placed at the foot of the present jury calendar. The defendant, as he alleges, understood the court to order that the cause be stricken from the jury calendar to be placed back on the jury calendar only upon notice. There is no charge of fraud in the defendant's petition, or that he was misled by any act of the plaintiffs, or by any fact which if known the Court would not have entered the judgment in this case. It is apparent from the petition filed in this proceeding that the defendant relies solely upon what he, the defendant, understood the order of the court to be. It would seem to this court that if the understanding of the litigants could upset orders entered by the court, then the court would be placed in the embarrassing position of having its orders questioned by the understanding of litigants. The defendant in this case had plenty of time between January 29, 1929, and June 9, 1930, when the judgment was entered, to ascertain the correctness of his understanding by an examination of the court records. No such diligence was used by the defendant,

To proceed or not, now you will see, my dear friends.

The time when the cigarette ended her leave to life

After the downward was completed, some not relative and relative

1947-1948

104-105

'affidavits and' of denials of such, except of military law

On January 23, 1962, when the same case on for hearing on the short

Count placed at the foot of the present jury calendar. The balance of

[illegible]

petition, or that he was aided by any act of the legislature, or by

any case which is known the Court would not have entered the judgment; and

in this case. It is apparent from the petition filed in this case-

4. Industrial and Trade Shows - Industrial and Trade Shows

understand the order of the court to be to return the child to the mother and to allow the mother to have the child.

that it was understood by the defendant that the defendant was not to be interviewed by the FBI.

by the court, then the court would be placed in the embarrassing

It is recommended that all information received be given to the following:

...the defendant in this case had plenty of time between

Suttons new American silk dress \$5.00 and up. 1234 Broadway

an 1400-1500 ft. and an 800-1000 ft. pl. in engineering.

and the trial court should not have vacated the judgment, especially where the sufficiency of the motion or the petition was questioned by the plaintiffs demurrer.

The defendant contends that the cause being upon the short cause calendar it could not properly be placed upon the regular jury calendar without notice to all parties. The order of the court is to the effect that the case be stricken from the short cause calendar and returned to the foot of the present jury calendar. The facts in the petition would indicate that at the time this order was entered the parties were present and had notice. Section 29 of the Practice Act provides in part that in the event such a cause is taken off the short cause calendar it shall, unless ordered by the court, go to the foot of the docket. In the instant case the court after the case was stricken, did order that it be placed at the foot of the jury calendar. This court in the case of Rosenthal v. Wald, 253 Ill. App. 383, said:

"In striking the case from the short cause calendar the court had power to make such direction as it might see fit. We find no rule of the Municipal Court regulating the disposition of short cause calendar cases when they are stricken from that calendar."

The defendant complains, however, that the order, as written, in the use of the words "present jury calendar", is indefinite and of no legal significance. The words would indicate that the present jury calendar in use for trial purposes at the time the order was entered was intended by the court as the calendar upon which this case was to be placed. This meaning seems to be clear, for when the case was again reached for trial, at the time the judgment was entered the judgment order found that this cause "comes in regular course for trial." The trial court had power to make such direction as was made in this case; the order is sufficiently clear, and the case was properly on the jury calendar when it was reached for trial.

by the Institute of the
where the membership of the motion or the position was questioned
and the still more difficult and very serious situation, especially

at the foot of the jury calendar. This court in the case of the court after the same was returned, did order that it be placed at the foot of the foot of the calendar. In the instant case it is shown that the same were returned at the foot of the calendar as provided in part three in the event such a return was received the parties were ordered to be notified, thereby in the foot of the calendar. It is further shown that at the time this calendar was returned to the court to the present jury calendar court is at the effect that the same be returned to the court.

Very respectfully submitted to all parties. The order of the court being entered.

The following calendar is being returned to the court for the calendar.

ROSENBERG, v. U.S. 303, 111, 179, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996

the Commission of the European Communities (CEC) and the European Central Bank (ECB) have been established. The CEC is responsible for the implementation of the common agricultural policy (CAP) and the common transport policy (CTP). The ECB is responsible for the implementation of the common monetary policy (CMP) and the common financial policy (CFP). The CEC and the ECB are both part of the European Union (EU) and are both responsible for the implementation of the EU's policies.

The following statement, however, that the same, as
stated, is the one at the time of the hearing, as
indicated by the fact of its being signed. The court would believe
that the present jury calendar in case for trial purposes is the
one that was entered and attached by the court at the hearing
upon which this case was to be placed. This meaning seems to be
clear. For when the case was again reached for trial, at the time
the judgment was entered the judge said that this was
"the original record of the trial." The judge would have been
with such intention as was made in this case; the order is withdrawn
by itself, and the case was removed on the jury calendar when it

Latet aut barbae non

The conclusion of the court is that the motion and petition filed by the defendant are not sufficient in law and the court erred in vacating the judgment, which conclusion disposes of the other questions raised in this case.

The order vacating the judgment is reversed and the case remanded with directions to the Municipal Court of Chicago to sustain the plaintiffs' motion to strike, which is in the nature of a demurrer to the defendant's motion and petition to vacate the judgment and to enter such other and further orders as may be consistent with this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

FRIEND AND WILSON, JJ. CONCUR.

The conclusion of the court is that the motion and petition filed by the defendant are not sufficient in law and the court shall in reversing the judgment, with compensation of the other questions raised in this case.

The order reversing the judgment is reversed and the case remanded with instructions to the district court of Chicago to amend the complaint, motion to set aside, which is in the nature of a demurrer to the defendant's motion and petition to reverse the judgment and to enter such order and decree as may be consistent with this opinion.

CHAS. E. SMITH, JR.
ATTORNEY AT LAW.

VERIFIED AND SWORN TO before me this 1st day of May, 1906.

34987

ROY P. MORRISON,

Appellant,

v.

JOHN McGRATH and ELLEN McGRATH,

Appellees.

53
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 626

Opinion filed Jan. 20, 1932

MR. PRESIDING JUSTICE REBEL delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment entered in the Municipal Court of Chicago for the defendant and against the plaintiff for costs. Plaintiff's claim is for real estate broker's commission amounting to \$300 for securing a purchaser for a two-flat building owned in joint tenancy by Ellen McGrath and John McGrath, her husband. This building is located at 8110 South Peoria Street, Chicago, Illinois.

The undisputed facts are that the defendant, Ellen McGrath, listed a two-flat building owned jointly with her husband, John McGrath, with the plaintiff, a licensed real estate broker, and that he offered this real estate to George W. Greenwood; that after negotiating with the defendant, Greenwood paid \$300 as earnest money to the defendant, for which she signed a receipt dated September 3, 1930, and delivered it to Greenwood; and that thereafter, on September 4, 1930, a contract of purchase was executed by ^{Ellen} McGrath and George W. Greenwood only. There is no question but that Greenwood was ready, able and willing to carry out the terms of the contract.

The question before this court is whether the plaintiff's right to recover for real estate broker's commission is contingent upon the assent of John McGrath to the terms of the contract for the sale of this real estate. The negotiations for the sale of this property were carried on by the plaintiff as a broker at the

JOHN F. McGRATH

Attorney

JOHN F. McGRATH and JOHN McGRATH

Appellants

ALLEN F. McGRATH

Respondent

OF CHICAGO

364 I.A. 686

Opinion filed Jan. 20, 1938

THE CHICAGO TRIBUNE

of the court

This is an appeal by the plaintiff from a judgment rendered in the Municipal Court of Chicago for the defendant and against the plaintiff for costs. Plaintiff's claim is for real estate located in the defendant's name in 1937 and consisting of a two-story for a two-flat building owned in joint tenancy by Ellen McGrath and John McGrath, her husband. This building is located at 1115 North Paulina Street, Chicago, Illinois.

The undisputed facts are that the defendant, Ellen McGrath, lived in a two-flat building owned jointly with her husband, John McGrath, who was the plaintiff. A divorce was granted to her and that he offered this real estate to George E. Greenwood; that after negotiating with the defendant, Greenwood paid \$500 as earnest money to the defendant, for which she signed a receipt dated September 3, 1936, and delivered it to Greenwood; and that thereafter on September 4, 1936, a contract of purchase was executed by McGrath and George E. Greenwood only. There is no question but that Greenwood was ready, able and willing to carry out the terms of the contract.

The question before this court is whether the plaintiff's right to recover for real estate located in the defendant's name upon the death of John McGrath to the terms of the contract for the sale of this real estate. The negotiations for the sale of

request of the defendant, Ellen McGrath, and \$200 was agreed upon by them to be paid to the plaintiff as a broker's commission.

The conflict in the evidence is as to what was said by the parties on the night of September 4, 1930, when the contract was signed by Ellen McGrath and George W. Greenwood. John McGrath, part owner, was not present, and did not sign the contract for the sale of this property. The evidence of the defendant is to the effect that she signed a contract to sell the property, with the understanding that the plaintiff would get her husband, John McGrath, to sign the contract, which was denied by the plaintiff. Greenwood, the buyer, testified that after the contract was signed by the defendant, Ellen McGrath and Greenwood, she said, "I may have a little difficulty in making the old man sign" (meaning her husband). John S. Boyle, attorney for the defendant, was present at the time the contract was executed and testified that after the papers were signed the defendant said, "Of course, you will have to obtain my husband's signature to this contract," and that Mr. Morrison said, "I will take care of that. I will obtain your husband's signature tomorrow morning at 10 o'clock." This defendant does not deny that she authorized the plaintiff to sell the property, or that she did not agree to accept the offer of Greenwood to purchase it. There is no denial that the defendant did agree with the plaintiff to pay a commission of \$200; but the defendant does deny that she is liable, for the reason that her husband did not sign this contract. This Court in the case of Joice v. Norman, 192 Ill. App. 285, in an abstracted opinion, where the facts were similar to those in the instant case, said:

"A broker employed by the owner to sell property, is entitled to his commissions when he produces a purchaser, within the time limited by his authority, who is ready, willing and able to purchase the property upon the terms proposed by the seller, even though the seller refuses to execute a contract on the ground that her husband declined to join with her."

request of the defendant, Ellen Kestner, and \$200 was agreed upon by them to be paid to the plaintiff as a broker's commission.

The conflict in the evidence is as to what was said

by the parties on the night of September 4, 1880, when the contract was signed by Ellen Kestner and George W. Greenwood. John Kestner, her owner, was not present, and did not sign the contract for the sale of this property. The evidence of the defendant is to the effect that she signed a contract to sell the property, with the understanding that the plaintiff would get her husband, John Kestner, to sign the contract, which was denied by the plaintiff. Greenwood, the buyer, testified that after the contract was signed by the defendant, Ellen Kestner and Greenwood, she said, "I may have a little difficulty in getting him to sign, but I will try."

John S. Doyle, attorney for the defendant, was present at the time the contract was executed and testified that after the papers were signed the defendant said, "Of course, you will have to obtain my husband's signature to this contract," and that Mr. Kestner said, "I will sign such as you want. I will sign your husband's signature tomorrow morning or in a week." This statement was made and that the defendant authorized the plaintiff to call the property, or that she had not given in writing the title of Greenwood to plaintiff. It is not denied that the defendant did agree with the plaintiff to pay a commission of \$200; but the defendant does deny that she is liable for the reason that her husband did not sign the contract. This Court in the case of John S. Doyle v. Kestner, 121 Ill. App. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The question as to whether or not the contract signed by Ellen McGrath and George W. Greenwood is enforceable is immaterial in this case. No objection was made by the defendant to the form or substance of the contract. Her only objection is that her husband did not sign it, and for that reason the plaintiff cannot recover. The plaintiff rendered services as a real estate broker, produced a purchaser ready, able and willing to purchase, and, who in fact, paid her \$300 as earnest money to apply on the purchase price. At that time the plaintiff had earned his commission as a broker for the amount agreed upon. The record does not justify the conclusion that the plaintiff's right to recover for commissions is contingent upon the signing of the contract by the defendant's husband. The plaintiff's offer to aid in obtaining the signature of John McGrath to the contract was a voluntary one, and did not militate against his right to recover.

For the reasons indicated in this opinion the judgment is reversed with a finding of fact, and judgment will be entered for the plaintiff by the Clerk of this Court for the sum of \$200 and costs against the defendant Ellen McGrath.

JUDGMENT REVERSED AND JUDGMENT HERE
WITH FINDING OF FACT.

FRIEND AND WILSON, JJ. CONCUR.

FINDING OF FACT: The court finds as a matter of fact that the property located at 8110 South Peoria Street, Chicago, Illinois, was listed for sale by the defendant Ellen McGrath with the plaintiff, a licensed real estate broker. He offered this real estate to George W. Greenwood, and after negotiating with the defendant Ellen McGrath, Greenwood paid \$300 to the defendant as earnest money to apply on account of the purchase price of the real estate, and he, Greenwood, was ready, able and willing to purchase this property for the price agreed upon. For this service rendered as a broker the plaintiff is entitled to recover from the defendant Ellen McGrath the sum of \$200.

The question as to whether or not the contract alleged by Ellen McNamara and George W. Greenwood is enforceable is immaterial in this case. No objection was made by the defendant to the form or substance of the contract. Her only objection is that her husband did not sign it, and for that reason the plaintiff cannot recover. The plaintiff rendered services as a real estate broker, procured a purchaser ready, able and willing to purchase, and, in fact, paid \$2000 as earnest money to apply on the purchase price. At that time the plaintiff had advised his commission as a broker and the amount agreed upon. The record does not justify the conclusion that the plaintiff's right to recover his commission is contingent upon the signing of the contract by the defendant's husband. The plaintiff's offer to sign is apparently the signature of John McNamara as the husband was a voluntary one, and did not constitute against his right to recover.

For the reasons indicated in this opinion the judgment is reversed with a finding of fact, and judgment will be entered for the plaintiff by the clerk of this court for the sum of \$2000 and costs against the defendant Ellen McNamara.

FORNARD J. FLETCHER AND JUDITH M. FLETCHER
PLAINTIFFS
VERSUS
ELLEN McNAMARA
DEFENDANT

VERDICT AND JUDGMENT, 11. 1907.

FINDINGS OF FACT: The court finds as a matter of fact that the property located at 1111 North Center Street, Chicago, Illinois, was taken for sale by the defendant Ellen McNamara with the plaintiff's consent and approval. He offered this real estate to George W. Greenwood, and after negotiating with the defendant Ellen McNamara, Greenwood paid \$2000 to the defendant as earnest money to apply on account of the purchase price of the real estate, and he, Greenwood, was ready, able and willing to purchase this property for the price agreed upon. For this service rendered as a broker the plaintiff is entitled to recover from the defendant Ellen McNamara the sum of \$2000.

35018

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

FRANK DURCZAK,

Plaintiff in Error.

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

264 I.A. 626⁵

Opinion filed Jan. 20, 1932

MR. PRESIDING JUSTICE NEBEL delivered the opinion
of the court.

The defendant was tried in the Criminal Court of Cook County upon an indictment for assault with a deadly weapon. Jury trial was waived by the defendant, and the Court found the defendant guilty as charged. After motions for a new trial and in arrest of judgment were overruled by the Court, the defendant was sentenced to imprisonment in the County Jail for a period of thirty days, from which judgment a writ of error to the Criminal Court of Cook County brings the matter before this court.

The indictment charges that the defendant, armed with a knife, being a dangerous and deadly weapon, and without any considerable provocation and under circumstances showing an abandoned and malignant heart, made an assault upon one Mary Frymula, with intent to inflict upon her person a bodily injury. The evidence is such as to show that on Christmas Eve of 1930, about midnight, there was a supper party at the home of Mary Frymula and her husband, 3133 South 54th Court, Cicero, Illinois. relatives and friends were present. The house was a one-story frame building with a plate glass store window in front, and the entrance was directly off the sidewalk. The parties were dining at a table near this window.

1938

THE PEOPLE OF THE STATE OF

MISSISSIPPI

VS.

JOHN J. WATKINS

Defendant

Opinion filed Jan. 20, 1938

of the State

The defendant was tried in the Criminal Court of

the County of Adams for a charge of murder.

The trial was held by the defendant, and the State being the

prosecution, being so charged. After a trial and an

acquittal, the defendant was returned to the County Jail

for a period of thirty days, from which he was released on the third day.

At the County Jail, the defendant was held for

the indictment charges that the defendant, John J.

Watkins, being a negro male, and being a free man,

did unlawfully kill and murder a white male, to-wit:

and maliciously, with an intent to kill, and with

intent to inflict upon her person a bodily injury, the

same as he did that on Christmas Eve of 1937, about midnight, when

she was a party of the home of Mary Watkins and her husband,

John J. Watkins, who was then residing at the home of

John J. Watkins. The house was a one-story frame building with a

front porch, and the entrance was through a

door. The porch was about 10 feet wide and 10 feet

The defendant and two companions, Leo Jagosinski and Al Matuszak, passed and looked in. John Prymula waved his hand to them to get away. About five minutes later, the boys opened the door, and Prymula got up and told them to "beat it". Thereupon, the defendant Durczak, struck Prymula in the face. The relatives, the family and the boarder stepped out into the street, and the boys engaged them in a general fight. The women in the party were pushed over into the snow. Mary Prymula tried to protect her husband. The boarder released a police dog and chased Durczak and his companions away. The plate glass window was broken, and during the fight Mary Prymula's hand was injured, there being a clean cut through the palm of the hand, about the center. Dr. Butler testified that it was an injury caused by a sharp instrument, which had penetrated the hand; that the size of the hole on one side was about three-quarters of an inch, and a little smaller on the other side; that he treated Mary Prymula that night after the accident, and that the wound was fresh and bleeding when he treated her.

We have examined the evidence, and are unable to find that there is any fact from which inference can be drawn, or circumstance that would tend to prove defendant guilty, beyond a reasonable doubt, of an assault with a knife upon Mary Prymula with intent to inflict bodily injury upon her. There is no proof in the record that the defendant used a knife in making the assault upon Mary Prymula. It is true that the defendant struck and assaulted her, as testified to by her husband, John Prymula; but her husband also testified that "he could not tell what he (the defendant) hit her with"; that "he thought he hit her with his hand," and that "he could not tell what he used."

There is no evidence by any of the witnesses that a knife was seen in the possession of the defendant or either of his

The defendant and the witness, who happened to be in the room, passed and looked in. John Flynn was with his hand to his head to get away. About five minutes later, the boys opened the door, and Flynn got up and told them to "beat it". Thereupon, the defendant, struck Flynn in the face. The witness, the family and the boarder stepped out into the street, and the boys engaged them in a general fight. The door in the party were pushed over into the snow. Mary Flynn tried to protect her husband. The boarder released a police dog and chased the boys and his wife away. The glass window was broken, and during the fight Mary Flynn's hand was injured, there being a clean cut through the palm of the hand, about the center. Dr. Miller testified that it was an injury caused by a sharp instrument, which had penetrated the hand; that the aim of the blow on one side was about three-quarters of an inch, and a little smaller on the other side; that he treated Mary Flynn that night after the accident, and that the wound was fresh and bleeding when he treated her.

He have examined the evidence, and was unable to find that there is any fact which inference can be drawn, or circumstances that would tend to prove defendant guilty, beyond a reasonable doubt, of an attempt with a knife upon Mary Flynn with intent to inflict bodily injury upon her. There is no record in the record that the defendant used a knife in making the assault upon Mary Flynn. It is true that the defendant struck and assaulted her, as testified to by her husband, John Flynn, and her husband also testified that "he could not tell what he (the defendant) did her with"; that "he thought he hit her with his hand," and that "he could not tell what he used."

There is no evidence by any of the witnesses that a knife was used in the possession of the defendant or either of his

companions. Unfortunately, Mary Prymula died before the trial of this case. Her death was the result of a disease; it was not brought about or due to an assault. There is evidence, however, that the defendant and his two companions were hoodlums who interrupted a peaceful gathering and caused an altercation, but from the facts, we are obliged to reverse the judgment finding the defendant guilty and sentencing him to a penalty of thirty days, for want of proof that the defendant used a knife in making the assault, as charged in the indictment; although he is guilty of an assault and battery, a lesser offense, and under the indictment before this court, subject to a penalty for that crime. Kennedy v. The People of the State of Illinois, 122 Ill. 649.

For the reasons given the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

FRIEND AND WILSON, JJ. CONCUR.

[illegible]

35037

JACK M. HOUSTON,

Defendant in Error,

v.

HENRIETTE HOUSTON,

Plaintiff in Error.

WRIT OF ERROR TO

SUPERIOR COURT,

COOK COUNTY.

264 I.A. 627

Opinion filed Jan. 20, 1932

MR. PRESIDING JUSTICE NEBEL delivered the opinion of the court.

The defendant, plaintiff in error, seeks to reverse the decree granting a divorce to the complainant, defendant in error, and brings the record in this case before this court upon a writ of error.

From the record it appears that Jack M. Houston, complainant, filed his bill for divorce on the 23rd day of July, 1930, in the Superior Court of Cook County, against his wife, Henriette Houston, the defendant, charging her with being guilty of extreme and repeated cruelty toward him, and with having committed adultery. Summons was issued by the Clerk of the Court directed to the sheriff of Cook County, which summons was served on the defendant by the sheriff on the 25th day of July, A. D. 1930. The sheriff made a return on the summons, which is as follows:

"Served this writ on the within named defendant, Henriette Houston, by delivering a copy thereof to her this 25th day of July, A. D. 1930."

On August 8, 1930, a default was entered and the bill of complaint was taken pro confesso against the defendant for want of her answer. The cause was heard on that same date before the Honorable Robert E. Gentzel, a judge of said court, who heard the evidence of the complainant and the witnesses produced by him, and entered a decree granting a divorce to the complainant from the defendant on the ground of cruelty.

2011

JACK M. HONESTON,

Defendant in Error,

v.

WILLIAM H. HONESTON,

Plaintiff in Error.

2041 A. 827

Opinion filed Jan. 20, 1932

MR. JUSTICE DUFFEL delivered the opinion.

At the court,

The defendant, plaintiff in error, seeks to reverse

the decree granting a divorce to the complainant, defendant in

error, and bring the record in this case before this court upon

a writ of error.

From the record it appears that JACK M. HONESTON, now

plaintiff, filed his bill for divorce on the 25th day of July, 1929,

in the Superior Court of Cook County, against the wife, WILLIAM

HONESTON, the defendant, charging her with being guilty of extreme

and repeated cruelty toward him, and with having committed adultery.

Summons was issued by the clerk of the court directed to the sheriff

of Cook County, which summons was served on the defendant by the

sheriff on the 25th day of July, A. D. 1929. The sheriff made a

return on the summons, which is as follows:

"I served this writ on the said WILLIAM HONESTON, now
plaintiff, on the 25th day of July, A. D. 1929."

On August 8, 1929, a default was entered and the bill of complaint

was taken pro confesso against the defendant for want of her answer.

The cause was heard on that same date before the Honorable Court

E. GONZALEZ, a judge of said court, who heard the evidence of the

complainant and the witnesses produced by him, and entered a decree

granting a divorce to the complainant from the defendant on the

On August 18, 1930, after the entry of the decree of divorce, the defendant filed a sworn petition to vacate and set aside the decree, and in the petition defendant alleges that there was defective service of summons, and that she first knew of the divorce on August 8, 1930, when she read of it in a newspaper. Hearing on this petition was continued from time to time until September 27, 1930, and on that day the defendant filed an amended petition, showing further grounds as to the manner in which service was had, and that said service of summons was such as to render the same void.

It also appears from the amended petition that the sworn bill of complaint charged that the complainant and the defendant lived together as man and wife until January 15, 1930; that the only testimony offered in support of the bill of complaint was with reference to acts of cruelty on July 30, 1926, March 30, 1928, and July 15, 1928, and that by the cohabitation between the parties, such acts were a condonation of the charge of cruelty; that the complainant's testimony in support of his bill of complaint was false; that the complainant had committed adultery during the months of May, June and July, 1930; that the matter of service was premeditated and made in order that the defendant might not know of the pendency of the divorce and thereby enable the complainant to obtain a default decree and marry Lenora Feldman. He did, in fact, marry the said Lenora Feldman on the day after the entry of the decree of divorce; that the defendant has a good defense to the charges of the bill of divorce; that it consists of the recriminatory defenses of adultery, and denial of the various charges of adultery and cruelty in the bill of complaint, and the defendant offered and tendered to the court the defendant's sworn answer to the bill, a copy of which is attached to the amended petition, and she further offered to pay

On August 12, 1930, after the entry of the decree of divorce, the defendant filed a sworn petition to vacate and set aside the decree, and in the petition defendant alleges that there was defective service of summons, and that she first knew of the divorce on August 3, 1932, when she read of it in a newspaper. Keeping on this petition was captioned "Katie" in the month of September 27, 1930, and on that day the defendant filed an amended petition, showing further grounds as to the manner in which service was had, and that said service of summons was such as to render the same void.

It also appears from the amended petition that the same bill of particulars charged that the respondent and the defendant lived together as man and wife until January 27, 1931; that the only testimony offered in support of the bill of complaint was with reference to acts of cruelty on July 30, 1928, March 28, 1929, and July 12, 1930, and that by the cohabitation between the parties, such acts were a condonation of the charge of cruelty; that the complainant's testimony in support of his bill of complaint was false; that the complainant had cohabited voluntarily during the months of May, June and July, 1930; that the matter of service was promulgated and made in order that the defendant might not know of the pendency of the divorce and thereby enable the complainant to obtain a default decree and marry another woman. He did, in fact, marry the said Katie Latham on the day after the entry of the decree of divorce; that the respondent was a good woman in the conduct of the bill of divorce; that it consisted of the testimonial balance of adultery and denial of the various charges of cruelty and cohabitation in the bill of complaint, and the defendant attacked and weakened the bill of complaint; that the defendant's sworn answer to the bill, a copy of which is attached to the amended petition, and the answer offered to pay

the costs of the suit that may be taxed by the court.

On September 27, 1930, the day the amended petition to vacate and set aside the decree, was filed, the court entered the following order;

"This matter coming on to be heard on the amended petition of the defendant filed herein this day in open court and it appearing that the complainant and defendant are in court and represented by counsel, and the Court having heard evidence on the service of summons, doth find that service of summons was made by the sheriff on the defendant.

It is hereby ordered, adjudged and decreed that the motion and prayer of the amended petition to vacate and set aside the decree is denied."

It is to be noted that evidence was heard by the court in passing upon the defendant's amended petition to vacate the decree, which evidence is not in the record. If the defendant wished to question the sufficiency of the proof heard by the trial court upon this amended petition to sustain the order entered by the court, it was necessary to preserve this evidence by a certificate of evidence containing all of the evidence. This requirement is so well established that citations of authority are not necessary. The defendant having failed to file a certificate of evidence this court will assume that the trial court heard evidence that justified the finding of an ultimate fact, which is that service of summons was had on the defendant by the sheriff in the manner provided by law. The defendant having been served and later defaulted for failure to appear, cannot after a decree is entered, avoid the effect of the decree by averring matters which if true and interposed as a defense in apt time, would have been a sufficient defense to the bill of complaint. Smith v. Smith, et al. 101 Ill. App. 187. Again, it has been held that where a divorce has been granted after default taken, it is improper to set the default aside, since the party may have married in the meantime, Davis v. Davis, 30 Ill. 180, unless fraud

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in some cases and is therefore not
admitted as evidence. The defendant's
family is not a party to the case and
the Court cannot take evidence on the basis of
such a report. The Court is not bound by
the report."

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is charged and established by the evidence heard by the court.

Considerable stress is put upon the point that the sworn amended petition of the defendant must be accepted as true, and the case of Hogan v. Ermovick, 335 Ill. 181, is cited as supporting this contention. No doubt under the facts in that case this may be the true rule, as announced by the Supreme Court in that case, but in the instant case evidence was heard by the trial court. Notwithstanding that fact, is this court bound to accept as true the defendant's amended petition? We believe not. It would be rather farfetched to hold that although the trial court heard evidence upon the facts offered in support of the amended petition, which facts do not appear in the record, this court is bound to accept the facts averred in the amended petition as true. Such is not the law.

The question now to be considered is, was the decree properly supported by the evidence, and was the evidence properly admitted in support of the bill of complaint?

The complainant filed a certificate of evidence, which was signed by the judge and contains all the evidence offered by the complainant and heard by the court in support of the bill of complaint, and from this certificate of evidence it appears that the complainant testified that he was a physician and surgeon; that he was married to the defendant, and that there were no children born of this marriage; that he had resided in the City of Chicago, County of Cook and State of Illinois for 15 years, and that during the time he lived and cohabited with the defendant, his wife, he treated her as a kind and dutiful husband; provided her with an automobile, apartment, necessary clothing, and that she left him on the 15th day of January, 1930; that during their married life she was very cruel, subject to violent fits of rage; that during such occasions

is charged and established by the evidence heard by the court.
Consequently it is not upon the basis of the
own sworn petition of the defendant must be accepted as true,
and the case of James v. James, 108 Ill. 181, is cited as support
ing this contention. No doubt under the facts in that case this may
be the true rule, as suggested by the learned judge in that case,
but in the instant case evidence was heard by the trial court, and
withstanding that fact, in this court would be enough to prove
the defendant's sworn petition as untrue and, it would be
rather surprising to find that although the trial court heard evi-
dence upon the facts offered in support of the amended petition,
which facts do not appear in the record, this court is bound to
accept the facts averred in the amended petition as true. That is
not the law.

The question now to be considered is, was the decree
properly supported by the evidence, and was the evidence properly
admitted in support of the bill of complaint?

The complainant filed a certificate of evidence, which
was signed by the judge and contains all the evidence offered by the
complainant and heard by the court in support of the bill of com-
plaint, and this certificate of evidence is signed and the
complainant testified that he was a physician and surgeon; that he
was married to the defendant, and that there were no children born
of this marriage; that he was married to her at Chicago, Illinois,
of Cook and State of Illinois for 15 years, and that during the time
he lived and cohabited with the defendant, his wife, he treated her
as a kind and faithful husband; provided her with an automobile,
apartment, necessary clothing, and that she left him on the first
day of January, 1900; that during these twelve years she was very
often, subject to violent fits of rage; that during such occasions

she would attack, strike and kick him, break up the household furniture, and on many occasions come into his office and broke up the office furniture and instruments; that on July 30, 1926, she came into his office and in the presence of other doctors and patients attacked him and broke the thumb of his right hand, necessitating medical attention; that on March 30, 1928, she came into his office, broke down the door and struck him over the head with a flashlight, lacerating and bruising his scalp and forehead, and creating such a disturbance that the police were called, and they had to take her to the police station; that they, the police, requested him to sign a complaint, which he did not do; that on the 15th day of July, 1928, she attacked him with a knife and stabbed him in the chest, causing a deep laceration, the instrument almost penetrating the lung; that he did not give her any occasion to commit these acts of cruelty.

Francis M. Punchard, a witness, corroborated the complainant as to the incident of cruelty alleged to have occurred on July 15, 1926. On this occasion he was visiting the complainant at his home when some trivial remark was made, and the defendant went into a violent tantrum, seized a knife and stabbed the complainant in the chest on the left side.

William Uher, a West Park police officer, testified as to the incident of cruelty alleged to have occurred on March 30, 1928; that he found the complainant in his office; that he was bleeding from his head where the defendant told him, Uher, that she hit him with a flashlight. Upon this evidence the court entered a decree of divorce.

It is contended that the facts are not sufficient to grant the relief prayed for in the bill of complaint, and that the acts of cruelty were long prior to the commencement of this divorce

proceeding; that the parties cohabited as man and wife subsequent to the acts charged, and that such acts were condoned. The rule which applies to the instant case is that condonation is forgiveness by the injured party of an antecedent mutual offense, on condition that the guilty party will not repeat the offense, and is dependent upon future good usage and conjugal kindness. The evidence in this record indicates that the complainant treated the defendant as a kind and dutiful husband, provided an apartment, an automobile for her use, furniture and clothing, and that she left the complainant on January 15, 1930. There is also evidence that the defendant was subject to violent fits of rage; that she would strike complainant, break household furniture, and occasionally destroy complainant's office furniture and instruments. There is enough in this record to justify the conclusion that the acts of cruelty were not condoned. If the acts of cruelty were condoned as contended, the fact that the defendant left the complainant on January 15, 1930, does not indicate good conduct on her part and such as would be conducive to happiness.

The point is made that this case was heard by the court during the summer recess and was not an emergency matter. This, however, was for the trial court to determine, and having exercised its discretion it is not for this court to determine the order of trials.

The record as it is does not justify a reversal of the decree of divorce, and accordingly it will be affirmed.

DECREE AFFIRMED.

FRIEND AND WILSON, J.J. CONCUR.

proceeding; that the parties copulated as man and wife and were
by the acts charged, and that such acts were consummated. The wife
which applies to the instant case is that consummation is forbidden
by the injured party of an antedated sexual offense, on condition
that the guilty party will not repeat the offense, and in this case
over future good name and conjugal happiness. The evidence in this
would indicate that the complainant treated the defendant as a man
and that husband, provided an apartment, an automobile and was
and that the defendant was a man, and that the defendant was
January 15, 1930. From all this evidence that the defendant was
subject to violent fits of rage; that she would strike the complainant
every household property, and especially the complainant's
office furniture and instruments. There is enough in this record to
justify the conclusion that the acts of cruelty were not isolated,
if the acts of cruelty were regarded as continued, the fact that
the defendant left the complainant on January 15, 1930, does not
indicate good conduct on her part and such as would be conducive to
permanence.

The point is made that when even was heard by the
court during the instant hearing and was not an emergency matter. This
hearing was for the trial court to determine, and having determined
the hearing it is not for this court to determine the issue of
trial.

The record as it is does not justify a reversal
at the house of divorce, and accordingly it will be affirmed.

REVEREND JUSTICE

THOMAS L. WILSON, J. C. WILSON.

34848

56
RUBY A. S. NICHOLSON, Individually
and as Administratrix of the
Estate of HARRIET E. SMITH,
deceased, Cross Complainant,

Defendant in Error,

v.

ANDREW J. LANE, et al., Cross
Defendants, BERTHA F. HOOPER,

Plaintiff in Error.

BRANCH TO

7
CIRCUIT COURT

COOK COUNTY.

264 I.A. 627²

Opinion filed Jan. 20, 1932

MR. JUSTICE FRIEND delivered the opinion of the court.

Ruby A. S. Nicholson, as administratrix of the estate of Harriet E. Smith, filed her cross-bill in a proceeding then pending in the Circuit Court of Cook County, naming as cross-defendants, Andrew J. Lane, Edward D. I. Hubbard and Rose Hubbard, his wife, Bertha F. Hooper and others. Upon issues joined the cause was referred to a Master in Chancery, who heard the evidence and recommended that a decree be entered in favor of complainant. Bertha F. Hooper, as cross-defendant, filed exceptions to the master's findings, which were overruled by the court and a decree was thereupon entered in favor of cross-complainant.

The facts, so far as they are essential to a determination of the issues presented for review, disclose that Harriet E. Smith, during her lifetime, was the owner in fee simple of improved real estate described in the cross-bill herein; that on June 10, 1922, she entered into a written agreement with Andrew J. Lane, one of the defendants to the original bill of complaint, and cross-defendant herein, whereby she agreed to sell said premises to Lane for the sum of \$16,000.00, subject to a first mortgage for \$6,500.00, maturing in September, 1928. Under the terms of said contract, Lane agreed to assume and pay with interest thereon the

said first mortgage in the sum of \$6,500.00, and to pay the sum of \$5,300.00 in installments of \$175.00 per month including interest thereon, as well as all taxes and assessments levied upon said property subsequent to the year 1921. The agreement provided that in the event said Lane failed to perform any of the terms, covenants and agreements therein set forth, promptly and according to the manner therein specified, then the earnest money paid on account of said agreement should at the option of Harriet E. Smith be retained by her as liquidated damages, and the agreement should thereupon become null and void.

The evidence discloses that Andrew J. Lane failed to pay interest on his indebtedness to Harriet E. Smith in accordance with the terms of said agreement and neglected to pay taxes levied on said premises, by reason whereof Harriet E. Smith was obliged to advance certain moneys to pay the interest on the first mortgage indebtedness as well as for the payment of taxes from the year 1921 to the date of her death; that by reason of these defaults Harriet E. Smith on July 10, 1923, delivered to said Lane a declaration of forfeiture, electing and declaring the contract entered into between her and said Lane forfeited and determined, and thereafter took possession of said premises, paid all taxes and assessments levied upon said premises, collected rents, made and entered into leases and agreements, and effected certain improvements on said premises.

Subsequent thereto Lane assigned his interest in part of the premises to Edward B. I. Hubbard and Rose Hubbard, his wife. He also made a certain agreement to convey a part of the property to one H. E. Wehrley and executed a quit claim deed in and to his title and interest in a portion of said premises to one of the other defendants, and finally on February 21, 1927, conveyed by quit claim deed all of his remaining right, title and interest in and to said property to Bertha F. Hooper, plaintiff in error herein.

said first mortgage in the sum of \$5,000.00, and to pay the sum of \$5,000.00 in installments of \$100.00 per month including interest thereon, as well as all taxes and assessments levied upon said property subsequent to the year 1921. The agreement provided that in the event said bank failed to perform any of the terms, covenants and agreements therein set forth, promptly and according to the terms specified, then the entire money paid on account of said agreement should at the option of said bank be retained by said bank as liquidated damages, and the agreement should thereupon become null and void.

The evidence discloses that under L. Lane failed to pay interest on his indebtedness to said bank in accordance with the terms of said agreement and neglected to pay taxes levied on said premises, by reason whereof interest on said mortgage is- due and certain money to pay the interest on the first mortgage is- due as well as for the payment of taxes from the year 1921 to the date of her death; that by reason of these defaults said bank on July 10, 1923, delivered to said bank a declaration of Ter- mination, stating and declaring the contract entered into between said bank and said bank forfeited and determined, and thereafter took possession of said premises, sold all taxes and assessments levied on said premises, collected rents, moneys and entered into leases on said premises, and effected certain improvements on said premises.

Subsequent thereto said bank retained the interest in said premises to Edward E. L. Hubbard and Rose Hubbard, his wife. It also made a certain agreement to convey a part of the property to one E. E. Worley and conveyed a part of the same to said bank and interest in a portion of said premises to one of the other defendants, and finally on February 27, 1927, conveyed by said bank back all of the remaining right, title and interest in and to said premises to said bank, which said bank thereafter conveyed to said bank.

Harriet E. Smith died on May 15, 1928, and letters testamentary were issued to Ruby A. S. Nicholson, cross-complainant, her daughter and sole heir who claimed to be seized in fee simple of the title to said premises at the time of the filing of her said cross-bill.

The principal question argued by counsel for plaintiff in error relates to the competency of Andrew J. Lane offered as a witness on behalf of Bertha F. Hooper, plaintiff in error. It is contended that Lane, having conveyed all his interest to Bertha F. Hooper in February, 1927, had no interest in the property nor in the outcome of the suit, and therefore, was competent to testify notwithstanding the provisions of Section 2 of the Evidence Act. (Section 2, Chapter 51, Cahill's Illinois Revised Statutes of 1921.) The master permitted Lane to testify as to certain matters in controversy, but at the conclusion of his examination ordered all of his evidence stricken from the record as being incompetent under the provisions of the foregoing statute.

The chancellor overruled exceptions taken to the master's ruling, and this writ of error is prosecuted to reverse the decree by the court upon the sole ground that the ruling of the court constituted error. Section 2 of the Evidence Act provides that:

"No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, " " " unless when called as a witness by such adverse party so suing or defending."

It appears from the record herein that Lane had then pending in the Superior Court of Cook County a bill in equity, seeking to set aside the forfeiture of the contract entered into between him and Harriet E. Smith. Furthermore, Lane was a defendant to the original bill in the instant proceeding in the Circuit Court as well as a cross-

of the title he said previously at the time of the filing of her said
her daughter and sole heir who claimed to be related in the above
testamentary were issued to Ruby A. E. Nicholson, executors-
Herbert E. Smith died on May 18, 1906, and leaving

The original decision rendered by the court in the case of *Wheeler v. Wheeler*, 100 N. H. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912

The channeler overruled the objection to the master's ruling, and this writ of error is presented to reverse the decree by the court upon the sole ground that the ruling of the court constituted error. Section 8 of the Evidence Act provides that

any deceased person, "X" unless when called as a witness by such attorney as being an attorney.

The Agent proceeding in the Illinois Courts as well as a cross-
M. Smith. Furthermore, there was a defendant to the original bill in
the custody of the court and this between him and another
Superior Court of Cook County a bill in equity, seeking to set aside
it appears that the court herein that was then pending in the

defendant to Ruby A. S. Nicholson's cross-bill. We are of the opinion that these facts were sufficient to render Lane's testimony incompetent under Section 2 of the Evidence Act. The fact that Lane had in 1937 made a purported conveyance of his interest in the premises to Bertha F. Hooper would not of itself tend to render him a competent witness. His assertion of an interest in the property by reason of the pendency of the suit in the Superior Court of Cook County, together with the fact that he was a party to the instant proceedings both as defendant to the bill of complaint and as cross-defendant to the cross-bill was sufficient to determine his status of competency as a witness under the statute, and we believe the chancellor's ruling in declaring him incompetent as a witness was properly made.

Counsel argues that the test of competency within the language of the statute is whether the witness will lose or gain by the event of the suit, and cites cases to support his contention. While that appears to be the rule, a party cannot assert an interest in the outcome of litigation then pending, and at the same time be heard to insist that he will not gain or lose by the event of the proceeding. Moreover, in determining whether a witness has any real interest in the outcome of litigation, the court should consider all of the circumstances. It is true that Lane disclaimed interest in the subject matter and sought to fortify his position by showing that he had conveyed his interest prior to the filing of the bill. Nevertheless, the other circumstances in evidence were sufficient justification for the court's ruling as to his competency. If the rule were otherwise, one who had a real interest in property which was the subject matter of litigation, and who might otherwise be incompetent as a witness under the statute, could render himself competent by merely assigning his interest to a third person, and thus circumvent the intent of the statute. Lane's conveyance in 1937 was not consistent with the fact that he had a bill pending in the Superior Court,

defendant to Baby A. S. Nicholson's ownership. It is one of the
evidences that from their own testimony of what Baby A. S. Nicholson
intended under Section 8 of the Evidence Act. The fact that Baby
and in 1937 made a purported conveyance of his interest in the prop-
erty to Baby A. S. Nicholson would not of itself tend to render his a
competent witness. His execution of an instrument in the property by
reason of the competency of the act in the Superior Court of Cook County
evident with the fact that he was a party to the instrument, and
both as defendant to the bill of complaint and as cross-defendant
in the same bill was sufficient to determine his status of com-
petency as a witness under the statute, and we believe the defendant
telling in declaring him incompetent as a witness was properly made.
The court agrees that the fact of incompetency within the
language of the statute is whether the witness will lose or gain by
the event of the suit, and since there is no such loss or gain by
this that appears to be the rule, a party cannot assert an interest
in the outcome of litigation then pending, and at the same time be
competent to testify that he will not gain or lose by the event of the
litigation. However, in determining whether a witness has any real in-
terest in the outcome of litigation, the court should consider all of
the circumstances. It is true that some disinterested interest in the
subject matter may exist, as in the case of a witness who is a party
to the litigation, and who may be interested in the result of the
litigation, and who may be interested in the result of the litigation.
However, one who has a real interest in property which was the
subject matter of litigation, and who might otherwise be incompetent
as a witness under the statute, would thereby become competent by
reason of his interest in the property, and his testimony
would be competent. The interest in the property in 1937 was not compe-
tent with the fact that he had a bill pending in the Superior Court,

through which he sought to set aside the forfeiture of Harriet E. Smith against him and other circumstances in evidence.

There being no other assignments of error, the decree of the Circuit Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization.

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No.34914

PHILIP H. COHEN,

Appellee,

v.

EDWARD A. PIERCE, et al. co-partners,
doing business under the firm name
of E. A. PIERCE & CO.,

Appellants.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

264 I.A. 627³

Opinion filed Jan. 20, 1932

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff filed suit in the Superior Court of Cook County, based upon a declaration consisting of the common counts, to which the defendants filed a plea of the general issue as to all of the plaintiff's claims except the sum of \$567.13, and a special plea alleging tender of said sum and refusal thereof. The cause was heard before the court and a jury, resulting in a verdict and judgment in favor of plaintiff for \$2462.90. This appeal is prosecuted to reverse that judgment.

Attached to plaintiff's declaration was an affidavit of claim setting forth that plaintiff's demand was for moneys aggregating \$2,011.25 had and received by defendants to and for the use of plaintiff from the unauthorized sale by defendant on or about November 12, 1929, of 50 shares of Radio-Keith Orpheum Corporation common stock, and 30 shares of Associated Gas & Electric Company "A" stock which belonged to plaintiff, and for moneys aggregating \$346.97 had and received by defendants to and for the use of plaintiff consisting of cash deposited by plaintiff with defendants on or about October 28, 1929, as margin in plaintiff's stock account with defendants, which margin remained and was unexhausted by reason of plaintiff's transactions in his said account; that there was due to plaintiff from defendants, after allowing all their just credits, deductions and set-offs, the sum of \$2357.32, together with interest thereon.

20.34314

UNITED STATES

IN SENATE

REPORT OF THE
COMMISSIONER OF THE
BUREAU OF REVENUE
FOR THE YEAR 1932

WASHINGTON

Opinion filed Jan. 20, 1932

MR. JUSTICE BRIDGES delivered the opinion of the court.
Plaintiff filed suit in the Superior Court of Cook
County, based upon a declaration containing of the common counts, in
which the defendant filed a plea of the general issue as to all
of the plaintiff's claims except the one of \$287.12, and a special
plea alleging payment of said sum and refusal thereof. The case was
heard before the court and a jury, resulting in a verdict and judg-
ment in favor of plaintiff for \$287.12. This appeal is introduced
to reverse that judgment.
Attached to plaintiff's declaration was an affidavit
of claim setting forth that plaintiff's demand was for sums aggregat-
ing \$2,011.88 and received by defendant as and for the use
of plaintiff from the unliquidated sale by defendant on or about
November 12, 1929, of 50 shares of Radio-Keith-Orpheum Corporation
common stock, and 25 shares of Incorporated as a Radio Company "A"
stock which belonged to plaintiff, and the money representing \$287.12
had and received by defendant as and for the use of plaintiff con-
sisting of cash deposited by plaintiff with defendant on or about
October 22, 1929, as margin in plaintiff's stock account with defendant,
which margin remained and was represented by reason of plaintiff's
stipulations in his said account; that there was due to plaintiff
from defendant, after allowing all their just credits, debts,
claims and set-offs, the sum of \$287.12, together with interest

The affidavit of merits filed by defendants with their pleas admits liability for \$867.13, alleges tender thereof and refusal, and sets forth also that at the close of business on October 28, 1929, plaintiff owed defendants \$3,703.68 for various stocks purchased by defendants for plaintiff's account; that on October 29, 1929, upon the order of plaintiff, defendants purchased for him 100 shares of Murray Corporation stock at \$36.88 per share, amounting to \$3,703.50, and 100 shares of Radio-Keith Orpheum Corporation common stock for \$3,080.00, and charged plaintiff's account therewith; that at the close of business on October 31, 1929, plaintiff owed defendants, for various stock purchases by defendants for plaintiff, the sum of \$3,356.42, and that upon said date plaintiff had on deposit with defendants to secure said unpaid balance 50 shares of Radio-Keith Orpheum Corporation stock, 30 shares of Associated Gas & Electric Company stock, and 100 shares of Murray corporation stock; that on November 13, 1929, defendants, feeling insecure as to said account, sold for and on account of plaintiff said 50 shares of Radio-Keith Orpheum Corporation stock for \$791.75, said 30 shares of Associated Gas & Electric Company stock for \$1,205.05 and the said 100 shares of Murray Corporation stock for \$1,838.00, and did on that date credit plaintiff with the proceeds of said sale, and that after doing so plaintiff had a credit balance with defendants of \$336.37, which together with interest and cost of suit to and including January 6, 1930, amounted to \$867.13, which was duly tendered to plaintiff and refused.

The facts as to which there is no dispute disclose that defendants are stock brokers with offices in the City of Chicago and other parts of the United States; that plaintiff, who has been connected with the Greek-American Sponge Company of Chicago for the past 17 years, had business dealings with defendants on various occasions for about 10 years prior to the institution of this suit.

The affidavit of service filed by defendant with
their first motion for judgment on the pleadings, and
refused, and were forth with and at the close of business on October
11, 1935, plaintiff owed defendant \$5,700.00 for various stocks
purchased by defendant for plaintiff's account, then on October 11,
1935, upon the order of plaintiff, defendant purchased for his 100
shares of Murray Corporation stock at \$25.00 per share, amounting to
\$2,500.00, and 100 shares of Radio-Kath Graham Corporation common
stock at \$25.00, and charged plaintiff's account therefor; that
at the close of business on October 11, 1935, plaintiff owed defendant
nothing, but various other payments by defendant to plaintiff, the
sum of \$1,750.00, and that upon said date plaintiff had on deposit
with defendant to secure said unpaid balance 50 shares of Radio-
Kath Graham Corporation stock, 50 shares of associated stock, 1
Radio-Kath Company stock, and 100 shares of Murray Corporation stock;
that on November 13, 1935, defendant, feeling insecure as to said
agreement, sold for and on account of plaintiff said 50 shares of
Radio-Kath Graham Corporation stock for \$750.00, and 50 shares of
associated stock 2 Radio-Kath Company stock for \$1,000.00 and the said
100 shares of Murray Corporation stock for \$1,000.00, and did so with-
out credit plaintiff with the proceeds of said sale, and that after
doing so plaintiff had a credit balance with defendant of \$250.00,
which was paid together with interest and cost of sale to and including
January 6, 1936, amounting to \$257.11, which was duly tendered to
plaintiff and refused.

The facts as to which there is no dispute are those
that defendant and stock brokers with offices in the City of Chicago
and other parts of the United States; that plaintiff, who has been
associated with the Radio-Kath Company of Chicago for the
past 15 years, had business dealings with defendant on various
occasions for about 10 years prior to the execution of this will.

and that the account in controversy had its inception in about 1927; that prior to 1929 plaintiff's business dealings with defendants were mutually satisfactory and were conducted through an employee of theirs by the name of Hoover; that on November 1, 1929, plaintiff had on deposit in his account with defendants 50 shares of Radio-Keith Orpheum Corporation common stock, 30 shares of Associated Gas & Electric Company "A" stock, and a cash balance of \$346.07; that the aforementioned stock certificates were fully paid for by plaintiff and were issued in his own name; that the 50 shares of Radio-Keith Orpheum Corporation stock had been on deposit with defendants for about two years prior to November 1, 1929, and the 30 shares of Associated Gas & Electric Company stock since August or September, 1929.

The conflict in the evidence arises over an alleged transaction purporting to have taken place on October 28, 1929. On that date, and for five or six days immediately following, there occurred what is known as the stock market crash of 1929, during which securities on the New York, Chicago and other stock exchanges decreased in value at a tremendously rapid rate.

Defendants adduced evidence tending to show that at 8:45 in the morning of October 28, 1929, before the opening of the stock exchange, plaintiff called the defendants and talked to Hoover, one of their solicitors or customer's man with whom plaintiff had been transacting his business, and with whose voice Hoover testified he was entirely familiar, and placed an order through him to buy for plaintiff's account 100 shares of the common stock of the Murrey Corporation, which was an automobile body building concern with plants in Detroit, and Indianapolis, at 37½ or better; that Hoover immediately made a memorandum of the order and placed it in the regular channels for execution, and in a short time on the same day received confirmation that said stock had been purchased for plain-

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tiff at 36-7/8; that a written confirmation of this purchase was mailed to plaintiff on the same day, and Hoover testified he also called plaintiff that day and informed him of the purchase; that a monthly statement showing this purchase was sent to plaintiff on November 1, 1929; that on November 8th, 1929, defendants requested plaintiff to make an additional deposit of \$800.00 on his account by reason of the continued decrease in the value of plaintiff's securities, which plaintiff failed to make, and that defendants thereafter on November 12th called upon plaintiff for a deposit of \$1,300.00 as additional security, and on said date informed plaintiff that unless such deposit was made by noon of November 13, 1929, they would under their authorization given them when the plaintiff opened his account, sell the securities in his account for the purpose of repaying themselves for advances made on his behalf; that plaintiff failed to deposit the last mentioned sum, and therefore, on November 12th, the defendants sold for plaintiff's account the 50 shares of Radio-Keith Orpheum Corporation stock, the 30 shares of Associated Gas & Electric Company stock and the 100 shares of Murray Corporation, giving plaintiff credit for the proceeds of such sale, and that when this credit was given it left a balance to the plaintiff in the sum of \$536.37, which defendants tendered to plaintiff by check, but was refused solely on the grounds that said sum was not the amount due him. Thereafter on January 6, 1930, suit having been instituted, defendants tendered to plaintiff the sum of \$567.13, which was the credit balance claimed by defendants to be due plaintiff plus interest and court costs accrued to date. The tender having been made in full satisfaction of plaintiff's claim, was likewise refused.

Plaintiff denies that Hoover called him on October 26, 1929, to inform him of the purchase of 100 shares of Murray Corporation stock at 36-7/8, and also denies that a monthly statement showing this purchase was sent to him on November 1, 1929.

... at 35-X-5; that a written notification of this transfer was
mailed to plaintiff on the same day, and however received by him
... this transfer was not to plaintiff on
monthly statement showing this transfer was sent to plaintiff on
November 1, 1935; that on November 1, 1935, defendant transferred
plaintiff to make an additional deposit of \$500.00 on his account by
reason of the continued decrease in the value of plaintiff's security
fund, which plaintiff failed to make, and that defendant thereafter
on November 15th called upon plaintiff for a payment of \$1,000.00 as
additional security, and on said date informed plaintiff that unless
such deposit was made by noon of November 15, 1935, they would order
their authorization given then when the plaintiff opened his account
with the securities in his account for the purpose of repaying them-
selves for advances made on his behalf; that plaintiff failed to do so
until the last mentioned sum, and therefore, on November 15th, the
defendants sold for plaintiff's account the 50 shares of Wells-Fargo
Common Stock then at \$20.00 per share at \$1,000.00 and a balance
of \$100.00 which the 100 shares of Wells-Fargo Common Stock then
at \$1.00 per share for the purpose of such sale, and that when this credit
was given it left a balance to the plaintiff in the sum of \$333.33.
That defendant transferred to plaintiff by check, but was returned
solely on the grounds that said sum was not the amount due him. There-
after on January 2, 1936, said money was deposited, defendant
transferred to plaintiff the sum of \$333.33, which was the credit balance
claimed by defendant to be the plaintiff's interest and share
of the account to date. The transfer having been made in full satis-
faction of plaintiff's claim, was likewise returned.
Plaintiff desired that account called him on October 20,
1935, so inform him of the purpose of the transfer of 100 shares of Wells-Fargo
Common Stock to him, and also called him a written statement showing
the purpose was sent to him in November 1, 1935.

Plaintiff offered evidence to show that on November 1, 1929, there were no other items of stock or cash in his account than the 50 shares of Radio-Keith Orpheum Corporation stock, 30 shares of Associated Gas & Electric Company stock, and a cash balance of \$367.07, and that he owed defendants nothing; that about November 8, 1929, he received from defendants a written notice bearing date November 6, 1929, and received in evidence as one of plaintiff's exhibits, requesting of him additional margin in the sum of \$800.00 by 10 o'clock A. M. November 8, 1929, or in default thereof that he reduce his account; that plaintiff thereupon immediately telephoned Hoover about the notice, and in view of the fact, as he stated, that his account was in good standing, inquired as to the meaning of the notice; that Hoover then told plaintiff he could not understand how that happened, that defendants had been very busy and mistakes might happen, and that he would look into the matter and was satisfied that plaintiff owed defendant nothing. Plaintiff further testified that on the same day about 3 or 4 o'clock in the afternoon he went over to defendants' office and had a personal conversation with Hoover, displaying to him the aforementioned letter or notice and again asked the meaning thereof; that Hoover then told plaintiff he had checked up the matter and found that 100 shares of Murray Corporation stock had been bought to plaintiff's credit; that plaintiff then asked Hoover if he remembered the placing of such an order by plaintiff, and Hoover replied that he did not; that plaintiff also asked Hoover if he remembered whether the order was given to him in person or over the telephone, and Hoover answered that he could not remember; that plaintiff then told Hoover he did not care for this stock, had never traded in it, never owned it before and did not want it; that Hoover thereupon told plaintiff he would look into the matter and see what could be done about it and try to straighten the matter out; that Hoover further stated to plaintiff that, not remembering whether plaintiff

gave the order for the stock, he would check into it at the main office for the purpose of determining whether he or somebody else wrote the order, to which plaintiff replied that he did not care who made out the order, that he had bought only from Hoover, and as long as Hoover did not remember anything about it, he did not want to receive any more letters asking him for additional security; that upon Hoover's assurance that he would look into the matter, plaintiff then left.

Plaintiff's testimony is unequivocal that he never gave an order or authorized defendants to purchase for him the Murray stock in October, 1929, or any other time, and that he never had any conversation with Hoover or anybody else connected with defendants, requesting them to purchase for him said stock.

It further appears from plaintiff's evidence that on November 12th he received a telegram from defendants dated November 11, 1929, demanding additional margin of \$1,300.00, and notifying him that in default thereof, defendants would sell for his account and risk a sufficient amount of his securities to satisfy their marginal requirements, and that said telegram was the first communication plaintiff had from defendants subsequent to his conversation with Hoover on November 6th. According to plaintiff's testimony, he immediately went to defendants' offices upon receipt of said telegram, and told Hoover he would not stand for this action by defendants, and would hold them accountable and responsible for anything they should do in that regard; that Hoover assured plaintiff he could not understand how this situation came about, that he had taken the matter up with his firm and they had promised to hold the matter up for a while, and that he again gave plaintiff assurance of his efforts to straighten out the situation; that at the conclusion of this conversation, Mr. Making, defendants' manager, came along, joined in the conversation and asked plaintiff, "Why didn't you come in sooner and tell us about that?", to which plaintiff replied that he did come in as soon as he received the first

...the office for the purpose of determining whether he or somebody else was ...
...the office, he would naturally require that he not only have access to ...
...the office, that he not only have access to the office, but also to the ...
...did not remember anything about it, he did not want to receive any ...
...more letters asking him for additional security; that upon Hoover's ...
...arrangement that he would look into the matter, naturally then later ...
...plaintiff's testimony is that he did not have any conversation with ...
...in October, 1933, or any other time, and that he never had any conversation ...
...either with Hoover or anybody else connected with defendants, witnesses ...
...ing them to purchase for him said stock.

...in October, 1933, he received a telephone call from defendant dated November 11 ...
...1933, demanding additional payment of \$1,500.00, and notifying him ...
...that in default thereof, defendants would sell for his account and the ...
...a sufficient amount of his securities to satisfy their marginal security ...
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...from defendant's apartment to his conversation with Hoover on November ...
...5th. According to plaintiff's testimony, he immediately went to ...
...defendants' offices were treated of said telephone call, and told Hoover he ...
...would not stand for this action by defendants, and would hold them ...
...accountable and responsible for anything they should do in that regard ...
...that Hoover stated plaintiff he would not maintain his suit against ...
...some time, but he did state the matter to him and that he ...
...intended to hold the matter as his own, and that he would ...
...plaintiff's account of his efforts to investigate and the situation ...
...that of the conduct of this investigation, as stated, defendants ...
...manager, come along, joined in the conversation and asked plaintiff ...
..."My idea's was that we should not sell the stock," he said.

plaintiff testified that he did come in as soon as he received the first

notice asking for more margin; that Mr. Making then inquired of plaintiff whether he did not get a notice advising him of the purchase of the Murray stock, and plaintiff said that he did not; that Mr. Making then informed plaintiff that he could not do anything at that time and that plaintiff should have come in sooner, to which plaintiff replied that he did come in as soon as he had heard about the matter and informed Hoover, the person with whom he was doing business; that plaintiff then told Making that he would hold defendants accountable for anything they should do with his stock, whereupon Mr. Making walked away and terminated the conversation. Making denies ever having talked to plaintiff about this or any other matter.

Plaintiff testified further that he had complained to Hoover about not receiving confirmation of his transactions and statements of his account, and that Hoover said defendants were very busy and overcrowded and plaintiff would receive the same within a few days; that he did not receive statements of his account for the months of September and October, 1929, until November 24, 1929, when he received in one envelope statements for the months of September and October. These statements and envelope were offered and received in evidence as one of plaintiff's exhibits.

The record thus presents a sharp conflict upon the sole question of fact as to whether or not the defendants were authorized by plaintiff to purchase for his account 100 shares of Murray Body Corporation stock. Upon this question both sides offered evidence which was heard by the jury, who had an opportunity to observe the witnesses and determine their credibility. The jury were the judges of the fact and it was their province to determine the degree of weight to be given the testimony of each witness. We see no sufficient reason for disturbing the verdict, unless the court otherwise committed reversible error upon the trial of the case.

Defendants contend that the court improperly admitted

in evidence a letter written by plaintiff to defendant on November 13, 1939, in which he reviewed, stated and explained the position which he later took and maintained on the witness stand. The salient parts of the letter complained of are as follows:

"I am astounded to learn just now that you have sold out my account. This action on your part is not only unwarranted and illegal, but is contemptible as well."

"On November 6th, 1939, I received out of the clear sky a letter from you demanding an additional margin of \$200. On that date * * * I owed you nothing."

* * * * *

"I then and there informed Mr. Hoover that I had never made or ordered such a purchase; that I had never traded in that stock, and that I never would have traded in such a stock, and demanded that he remove that transaction from my account. * * *

"I told him that I would not stand for such tactics on the part of any brokerage concern. I should add that when I first phoned Mr. Hoover with regard to this matter, he expressed surprise that I should receive such a demand in that he stated that he knew that my account was in good shape. However, now he sings another tune and says that he cannot understand how he could have gotten the transaction out of the air."

* * * "I immediately got in touch with Mr. Hoover and told him that I would never stand for such a procedure, and that if your company proceeded to sell me out, you would do so at your own risk, and that I would hold you accountable and responsible for it. * * *

"This morning I am in receipt of your sales memoranda indicating that you have sold out my account, thereby placing upon my shoulders, as you seek to do, an enormous loss."

Counsel by their brief, insist that the foregoing letter was clearly a self-serving declaration, and should not have been admitted in evidence. When the letter was offered, defendants' counsel objected thereto, stating that he believed it to be inadmissible "as a self-serving declaration". Plaintiff's attorney thereupon stated to the court that he was offering the letter for the purpose of showing repudiation by plaintiff of the transactions involved. The court, in ruling on the objection, stated: "I think I will admit it. It is a self-serving declaration in a way. Of course, the jury will take account of it, but for the purpose of showing that he did not at

of various other matters, including the fact that the
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1. After the above information is given, the following information is given:

On that day I was very happy.

I am glad you are sending me additional material.
I received it on November 19, 1960.

I have been thinking about you very much lately and wondering how you are getting along. I hope you are well and happy. I am still here, working hard as usual.

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Journal by their brief, leaving that the recording
letter was already a self-serving declaration, and should not have
been admitted in evidence. That the letter was written, however,
counsel objected thereto, stating that he believed it to be inad-
missible "as a self-serving declaration". (Exhibit is returned) When
this attempt to get the letter in was denied the judge for the court
of appeals proceeded to discuss it at the preliminary hearing. The
court, in ruling on the objection, stated: "I think it well established
it is a self-serving declaration in a case like this. The fact will
be enough of it, but the court was of course of course that the fact was

any time acquiesce in this transaction, I think it is competent for that and for no other purpose." Thereupon defendants' counsel offered to stipulate that plaintiff had sent a letter to defendants on that date, but the offer of stipulation was not accepted by plaintiff, and the court allowed the letter to be received in evidence and ordered counsel to proceed with the trial.

We think it was incumbent upon plaintiff to repudiate the transaction at the earliest possible moment. The letter is dated November 13, 1929, immediately following the receipt by him of sales memoranda, indicating that defendants had sold out his account. The rule is clear in this state and other jurisdictions, that where a principal upon being informed of an unauthorized act of another in his behalf does not give notice of his nonconcurrence within a reasonable time, he is held to assume the responsibility.

Hau Claire Canning Co. v. The Western Brokerage Co., 313 Ill. 581. In Schaefer v. Dickinson, 141 Ill. App. 334, this court held that in the case of a stock market transaction where time is of the essence, "while in a sense a reasonable time is always allowed for consideration before such a ratification is presumed from the silence, it is practically true that to prevent the inference of ratification attaching, an immediate repudiation is necessary after the knowledge of the alleged order and resulting sale came to the plaintiff." While it is true that the letter contained some self-serving statements, we think it was nevertheless admissible in evidence for the sole purpose, as stated by the court, of showing that plaintiff did not at any time acquiesce in the transaction. In National Importing Co., v. Bear & Co., 334 Ill. 348, the court stated the rule of law as follows:

"Certain letters introduced in evidence were objected to on the ground that they were of a self-serving character. " " " However, a letter otherwise competent will not be rejected because it contains statements of a self-

at this juncture in this connection, I think it is important for
first and for another purpose. "Therefore defendants' counsel often
to estimate the plaintiff had been a factor in determining the
date, but the offer of stipulation was not accepted by plaintiff, and
the court allowed the issue to be resolved as required and stated
amount to be paid with the bill.

So when it was found that plaintiff is responsible
the character of the evidence possible amount. The latter is
date October 17, 1937, immediately following the receipt by him
of other documents, indicating that defendant had said and his
amount. The date is clear in this case and other jurisdictions.
that there is a principal upon which is an understanding of
amount is the plaintiff's duty not give notice of his non-acceptance
within a reasonable time, he is held to assume the responsibility.
the plaintiff's duty. The plaintiff's duty is to pay the bill.
in Harmon v. Harmon, 121 Ill. App. 3d, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 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serving character. * * * We have examined the letters complained of in this case, and while they contain certain self-serving statements, the letters themselves are competent as showing the transactions between the parties pertaining to the performance of the contract."

It would have been proper for defendant to offer an instruction limiting the effect of the letter to the purposes for which it was admissible. No such instruction was offered, however, but the court did state in the presence of the jury that the writing was admissible for only one purpose and no other, and under the circumstances defendant's rights were presumably not violated. Moreover, all of the facts narrated in the letter were testified to and in evidence prior to the admission of the letter, and thus no particular harm could have resulted from the contents of the writing. It was merely a review of the various steps connected with the transaction from plaintiff's point of view, and in the nature of a summary of the evidence adduced by plaintiff in support of his claim. A similar situation was presented to the court in Powers Storage Co. v. Industrial Commission, 340 Ill. 428. In that case objection was made to the oral narration of facts. The court characterized the testimony there offered as incompetent to prove the facts stated, "but the facts were testified to at the hearing by the defendant in error, and the evidence objected to was proper to show notice to the plaintiff in error."

The remaining assignment of error relates to several instructions. It is first urged that the court erred in refusing instruction Number 5 offered on behalf of defendant, which was as follows:

"The court instructs the jury that while the law permits the plaintiff in a case to testify in his own behalf, nevertheless, the jury have the right in weighing his evidence to determine how much credence is to be given to it and to take into consideration that he is the plaintiff and interested in the result of the suit."

The subject matter of this instruction is fully covered in defendant's instruction Number 7, which was given by the court. This precise

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...the fact that the ...
...the fact that the ...

It would have been proper for defendant to offer an
introduction listing the effect of the latter to the purpose for
which it was submitted. In such introduction was omitted, however,
that the court did state in the evidence of the fact that the
was admitted for only one purpose and no other, and under the cir-
cumstances defendant might have reasonably and properly
all of the facts brought in the latter was admitted as was in
evidence prior to the admission of the latter, and that no previous
fact had been previously from the evidence of the latter. It
was merely a review of the various facts connected with the transaction
from defendant's point of view, and in the nature of a summary of
the evidence shown by plaintiff in support of his claim. A similar
evidence was presented to the court in United States v. ...
First Commercial, Inc. In that case evidence was shown in
the trial testimony of the fact. The court characterized the testimony
thereafter as incompetent to prove the facts stated, "but the
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question was passed upon in Ray v. Standard Oil Company, 134 Ill. App. 421, where the court in confirming the judgment of the trial court in a personal injury suit, said:

"The fifth, the refusal of which appellant contends is reversible error, relates to the fact that appellee was permitted to testify on his own behalf, and that his interest in the event of the suit might be considered in determining the credit to be given to his testimony. This instruction stated a correct rule of law and appellant was entitled to have the jury instructed thereon. Had it not been embodied in other instructions given, its refusal would have been reversible error, under the authority of West Chicago St. Railroad Co. v. Dougherty, 170 Ill. 379; Chicago & Eastern Illinois Railroad Co. v. Burridge, 211 Ill. 9. However, in these cases there was no other instruction telling the jury that the interest of the witness was to be considered. In this case, the seventh instruction given for appellant told the jury that in determining the weight to be given to the testimony of the different witnesses, they had a right 'to take into consideration the interest of the witnesses, if any, in the event of the suit, their feelings, or bias, if any had been shown, their demeanor while testifying and their means of knowledge of the matters testified to, and to give credit to the testimony of each witness as, under the circumstances in evidence, such witness seems entitled to'. We conclude that this instruction sufficiently embodied the principle contended for by appellant."

Instruction Number 7 in the instant case was substantially the same instruction as that offered in the case above cited, and likewise sufficiently embodied the principle of law by which the credibility of witnesses and the weight or preponderance of the evidence should be determined by the jury.

Under Instruction Number 9 offered by plaintiff, the court advised the jury that the burden of proof was upon the defendants to show by a preponderance of the evidence that plaintiff authorized the purchase of the Murray stock in controversy. By instruction Number 3, offered on behalf of defendants, the court instructed the jury that plaintiff was required to establish his case by a preponderance of the evidence. It is contended that this conflict caused a hopeless confusion and constitutes error. Under the issues as made up by the pleadings, we are of the opinion that plaintiff's instruction Number 3, offered by plaintiff, stated the correct rule of law.

Plaintiff had made out his case by proving the unauthorized sale of his stock, as he contended, and by showing that there was a certain amount of cash on deposit with defendants in his account. Defendants were relying upon the alleged authority from plaintiff to purchase the Murray stock in question, and it was therefore, incumbent upon them to prove this affirmative defense by a preponderance of the evidence, and to show that they did, in pursuance of an authorization by plaintiff, purchase and later sell the stock in question. Baker v. Abbott Mfg. Co., 218 Ill. App. 476. It follows from what has been said that instruction Number 3 offered by defendants does not correctly state the rule of law applicable to the circumstances. However, if harm was done in offering these conflicting instructions, it was in favor of defendants who offered the improper instructions, and they should not now be heard to complain thereof.

We are of the opinion that the court committed no error in admitting plaintiff's letter of November 13, 1929, in evidence, or in the giving and refusing of the instructions herein mentioned. The principal issue was the question of fact as to which there was a sharp conflict in the evidence, and it was solely within the province of the jury to determine this fact under the instructions of the court which, in the main, were proper.

We find no reversible error in the record, and therefore the judgment of the Superior Court will be affirmed.

AFFIRMED.

HEBEL, F.J. AND WILSON, J. CONCUR.

35025

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

WILLIAM H. H. MILLER,

Plaintiff in Error.

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ERROR TO

CRIMINAL COURT,

COOK COUNTY.

264 I.A. 627⁴

Opinion filed Jan. 20, 1932

MR. JUSTICE FRIEND delivered the opinion of the court.

At the October Term, 1929, of the Criminal Court of Cook County, the defendant, William H. H. Miller, was indicted with one Mitchell Blaine, for the crime of conspiracy. Defendant, Miller, alone was tried and the jury returned a verdict finding him guilty of conspiracy in manner and form as charged in the indictment, and fixed his punishment at imprisonment in the county jail for the term of seven months and one day, and imposed a fine of \$2,000.00. After overruling a motion for new trial, the court entered judgment on the verdict, and this writ of error is prosecuted to reverse that judgment.

The indictment contained 23 counts, each concluding contrary to the statute, and in each of them it is alleged that the defendant, Miller and one Mitchell Blaine, on the 3rd day of June, 1929, in Cook County, did conspire, confederate and agree with each other to commit the crime of conspiracy.

As grounds for reversal, defendant urges (1) that the state failed to prove that two persons participated in the alleged conspiracy in Cook County as alleged in the indictment, and (2) that the court gave an improper instruction on behalf of the People.

Counsel for the People call our attention to the fact that the abstract of record, consisting of 27 pages, is incomplete, and does not contain all of the evidence offered and received as

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is deeply concerned by the fact that the CLPS is active in the United States and is working to recruit and train individuals for the purpose of overthrowing the Government of the United States. The Commission is also concerned by the fact that the CLPS is working to establish a network of individuals who are active in the United States and are working to overthrow the Government of the United States. The Commission is deeply concerned by the fact that the CLPS is active in the United States and is working to recruit and train individuals for the purpose of overthrowing the Government of the United States. The Commission is also concerned by the fact that the CLPS is working to establish a network of individuals who are active in the United States and are working to overthrow the Government of the United States.

shown by the transcript of the record which contains 489 pages; that by reason of the incomplete abstract filed herein, any doubt arising from the evidence should be resolved against the defendant, and that on appeal it will be presumed that there was sufficient other competent evidence introduced to warrant the findings of the court on the questions of fact in issue. This is undoubtedly a correct statement of the rule as laid down in People v. Armour, 307 Ill. 334, and People v. Adams, 289 Ill. 339. However, the state has filed an additional abstract of record, supplying so much of the omitted evidence as tends to sustain their contention with reference to the facts disclosed by the record, and refers us to the record with proper references as to some matters contained in the transcript which were omitted from both the abstract and the additional abstract of record.

The purpose or common design of the conspiracy charged was to obtain money from medical and dental students and practitioners who were ineligible to take the state examinations required by law under the supervision of the Department of Registration and Education of the State of Illinois in order to obtain a license to practice in Illinois, by falsely pretending that said conspirators, Miller and Blaine, with the assistance of one Robert Adcox of St. Louis, could, for a monetary consideration and by the use of alleged political influence and certain alleged connections with said department, make said students and practitioners eligible to take said examinations, and to facilitate them in obtaining Illinois licenses.

Numerous witnesses were called on behalf of the state. Rudolph M. Bollmeier testified that he resided in St. Louis, Missouri, attended the St. Louis College of Physicians and Surgeons during the years 1917 - 1921 and was graduated therefrom, receiving a diploma, which, however, did not entitle him to be examined in order to obtain a license to practice his profession in Illinois; that early

shown by the transcript of the record which contains two pages;
that by reason of the incomplete abstract filed herein, any doubts
arising from the evidence should be resolved against the defendant,
and that on appeal it will be presumed that there was sufficient
competent evidence introduced to warrant the findings of the court
on the questions of fact in issue. This is undoubtedly a correct
statement of the rule as laid down in People v. Jones, 207 Ill. 234,
and People v. Adams, 229 Ill. 226. However, the state has filed
an additional abstract of record, supplying so much of the omitted
evidence as tends to sustain their contention with reference to
the facts disclosed by the record, and refers us to the record
for proper reference as to some matters contained in the transcript,
which were omitted from both the abstract and the additional abstract
of record.

The purpose of the state in filing of the additional abstract
was to obtain money from medical and dental students and practitioners
who were ineligible to take the state examination required by law
under the supervision of the Department of Registration and Education
of the State of Illinois in order to obtain a license to practice
in Illinois, by falsely representing that such practitioners, either
and Maine, with the assistance of one Robert Abner of St. Louis,
would for a money consideration and by the use of alleged political
influence and certain alleged connections with said department,
make said students and practitioners eligible to take said examina-
tions, and to facilitate them in obtaining Illinois licenses.

Various witnesses were called on behalf of the state.
Witnesses testified that he resided in St. Louis, Missouri,
attended the St. Louis College of Pharmacy and Surgery during the
years 1897 - 1901 and was graduated therefrom, receiving a diploma,
which, however, did not entitle him to be examined in order to
obtain a license to practice his profession in Illinois; that only

in 1929 in St. Louis, Missouri, he talked with the defendant, Miller, and also with Blaine and Adcox about obtaining a license in this state, and that Adcox told him he had some kind of connection whereby they could arrange for him to take the examination, and that it would cost \$2,000.00; that he thereupon sent Adcox \$100.00 on account that same evening; that he had a further conversation with Adcox on March 5, 1929, at the latter's home in St. Louis, in which Adcox assured him that he could take the Illinois examination; that 10 days later he sent Adcox \$400.00 from Kirksville, Missouri; that \$1,400.00 was to be paid by him to Miller, Blaine and Adcox before taking the examination, and \$600.00 after procuring his license; that two or three weeks later he gave Adcox \$300.00 in travelers' checks; that about the last of March, 1929, he went to Springfield, Illinois, with Adcox and there met Blaine and Miller; that Blaine demanded and received \$30.00 from him in Miller's presence and said he could procure for the witness a hospital connection there; that Blaine then told him the examination was to be held in East St. Louis and not Chicago; that Adcox and Blaine stated that Miller was connected with the Department of Registration and Education, and that Blaine was an inspector for the department; that Blaine showed him a badge as a credential, which was introduced in evidence by the state; that on April 10, 1929, he met Blaine and Miller at the Claridge Hotel in St. Louis and Blaine gave him a sheet of questions and a book in which to write, 10 questions on each subject; that on that evening defendant Miller told him he was writing a good paper and that he thought he could get the witness a position in one of the Illinois state hospitals after his license was issued; that he continued writing the next day and when he told Blaine that certain questions were troubling him, Blaine brought some sheets containing answers to several of the questions, which the witness later turned over to the State's Attorney's office; that after the examination books were

[illegible]

written up he handed all of them to Blaine except the last one, which he gave to Miller, and that Miller then told him he would hear further from him within 10 days; that neither Miller nor Blaine communicated with him thereafter, but about May 1, 1938, Adcox stated to him in St. Louis that his papers were held up and that "things would come out all right."

Robert Adcox testified for the People that he lived in St. Louis, Missouri, telephone "Delmar 3309"; that he had known Mitchell Blaine for five or six years, and identified one of the People's Exhibits as a likeness to Blaine; that he knew Miller and pointed him out in the courtroom; that in June, 1938, Blaine called at the witness' home in St. Louis and told him that Blaine and Miller were working on a plan to register graduates of the St. Louis College of Physicians and Surgeons as Miller did when he was head of the Department of Registration and Education, and that he would inform Adcox when the plan was perfected; that about November 10, 1938, the witness received a telephone call from a voice which he recognized as Blaine, saying, "This is Blaine; I am in Chicago. Will you meet myself and Mr. W. M. H. Miller at Springfield, Illinois, tomorrow at the Lincoln Hotel around noon?", to which the witness replied, "I will"; that he thereafter met Miller and Blaine at Springfield at the Lincoln Hotel; that Miller told him that he could help him (Miller) and Blaine handle some people, inasmuch as he, Adcox, had operated a medical quiz course in St. Louis, and that it would ^{cost} \$3,000.00; that the witness should try and get \$2,500.00; that Miller was to handle the political end of the enterprise and must have \$1,500.00 representing his part of the fee in advance; that Blaine then read to him a list of students, and Miller said, "You can help us make money for ourselves and yourself"; that he, Adcox, recognized some names on Blaine's list, and thought he could furnish several men, among whom were Rudolph E. Bollaeier, one Poe, and one

written up he handed it to him to write except the last one, which he gave to Miller, and that Miller then told him he would hear further from him within 10 days; that neither Miller nor Maine communicated with him thereafter, but about May 1, 1937, Miller stated to him in St. Louis that his papers were held up and that "you would hear out all right."

Robert Abner testified for the people that he lived in St. Louis, Missouri, telephone number 7-1234, that he had known Mitchell Maine for five or six years, and identified one of the people's exhibits as a likeness to Maine; that he knew Miller and pointed him out in the courtroom; that in June, 1937, Maine called at the witness' home in St. Louis and told him that Maine and Miller were working on a plan to register graduation at the St. Louis College of Pharmacy and Surgery as Miller did when he was back of the Department of Registration and Education, and that he would refuse them and that was refused; that about November 12, 1937, the witness received a telephone call from a voice which he recognized as Maine, saying, "This is Maine; I am in Chicago. Will you meet me at 7:30 p. m. at the St. Louis Hotel, Missouri, tomorrow at the Lincoln Hotel across street," to which the witness replied, "I will"; that he thereafter met Miller and Maine at the Lincoln Hotel; that Miller told him that he could help him (Miller) and Maine handle some people, including as he stated, had operated a medical golf course in St. Louis, and that it would be \$5,000.00; that the witness should try and get \$5,000.00; that Miller was to handle the collection end of the enterprise and that he was representing his part of the fee in advance; that Maine then read to him a list of students, and Miller said, "You can sign as many names for students and parents," that he, Miller, testified that he had signed the list, and thought he would be paid \$5,000.00, and that he had signed the list.

Samuel Sparber; that when he returned to St. Louis he talked to Poe about obtaining an Illinois license; that in December Adcox and Elaine met Poe and advised him that Miller and Elaine could register him in Illinois for \$2,500.00; that later Adcox, Elaine, Poe and Miller met at the Marquette Hotel, and that Miller talked to Poe alone; that said Bollmeier, after being solicited, sent Adcox \$100.00, and he, Adcox, sent him an application in December; that in March, 1939, Bollmeier called on the witness in St. Louis, and ten days later sent him a check for \$300.00, and a week thereafter paid him \$300.00 more in travelers' checks; that he arranged with Bollmeier to have the latter register in Illinois under their plan; that he, Adcox, then telephoned Miller in Springfield or Champaign, advising that Bollmeier had made a good deposit; that the next day the witness and Bollmeier met Miller in Springfield and Bollmeier there paid \$800.00 in currency and \$600.00 in travelers' checks; that he then returned to St. Louis and received money from Poe; that Miller thereafter came to St. Louis, met Poe and Adcox and Poe paid Miller \$1,000.00 in currency.

Adcox further testified that he later met Elaine and Miller at the Claridge Hotel in St. Louis and there examined Poe, Bollmeier and five others; that the next day he saw Elaine and Miller at the same place and Elaine was dictating questions and Miller was writing them; that on May 10th, Mrs. Sparber called at the witness' home and said she understood that graduates of the St. Louis College of Physicians and Surgeons could register in Illinois, and that she was interested on behalf of her husband; that the witness told her he was in touch with the former director of the Board of Registration and Education, and thought he could be the means of registering them in Illinois; that while she was there Elaine telephoned the witness saying he was in Chicago and said, "I have located the Sparbars at the Bergstone, or Blackstone; at any rate he was an intern at some

hospital in Chicago;" that in the year 1929 and until the time of Blaine's arrest, he, Adcox, received telephone calls from the defendant Miller of Champaign, Illinois; that as soon as he learned Blaine had been arrested he called up Miller and told him, and Miller said, "My God, has Blaine been arrested?" That he then told Miller he was going to get into serious trouble unless he returned that money, and that Miller said, "Doctor, I will be glad to pay it back to you"; that he and Joe then drove to Champaign to see Miller, but the latter was not at home; that that evening he received a wire from Miller stating the latter had been urgently called to West Virginia.

Mrs. Dora Sparber, a witness called on behalf of the people testified that on May 10, 1929, in St. Louis, Adcox told her he had a certain party in Chicago who would help Sam (her husband) make the Illinois State Board; that Adcox requested \$1,500.00; that after she returned to her home in Chicago she received four letters and one telegram from Adcox, and later Adcox telephoned her in Chicago; that she talked over the telephone with one "J. C. Dixon", who wanted to know if she had the money for the old man; that she had several telephone conversations with Dixon, and he later called at her home and had the witness' husband fill out an application blank; that on June 4, 1929, she and her husband met Dixon in the Hotel La Salle lobby in Chicago and Dixon and her husband went downstairs; that Dixon refused a cashier's check tendered to him by Sparber, saying the old man wanted currency; that the witness then cashed the check, same being for \$500.00, at the Boston Store, and then she and her husband returned to the Hotel La Salle, where the currency was paid to Dixon; that Dixon then told them they would hear from him in a few days, but that they received no further word from Dixon, and her husband did not receive the license. The witness identified one of the state's exhibits as a likeness of Dixon.

hospital in Chicago; that in the year 1933 and until the time of
Malone's arrest, he, Malone, remained in Chicago from the
defendant Miller of Chicago, Illinois; that as soon as he learned
Malone had been arrested he called to Miller and told him, and
Miller said, "Up God, now Malone been arrested." Then he then told
Miller he was going to get into various trouble unless he returned
that money, and that Miller said, "Doctor, I will be glad to pay
it back to you"; that he and "Doc" then drove to Chicago to see
Miller, but the latter was not at home; that that evening he received
a wire from Miller stating the latter had been urgently called to
New York.
Mrs. Nora Gardner, a witness called on behalf of the
people testified that on May 12, 1933, in St. Louis, Aaron told her
he had a certain party in Chicago who would help her (her husband)
with the Illinois State Bank; that when contacted by \$100,000 that
after she returned to her home in Chicago she received two letters
and one telegram from Aaron, and later Aaron telephoned her in
Chicago; that she talked over the telephone with one "L. A. Dixon",
who wanted to know if she had the money for the old man; that she had
several telephone conversations with Dixon, and he later called at
her home and had the witness' husband fill out an application blank;
that on June 4, 1933, she and her husband met Dixon in the Hotel de
Ville lobby in Chicago and her husband went downstairs;
that Dixon returned a checkbook to Dixon and he then handed to him by Gardner,
saying the old man wanted currency; that the witness then asked the
check, being for \$200,000, at the Boston store, and then she
and her husband returned to the Hotel de Ville, where the currency
was paid to Dixon; that Dixon then told them they would hear from
him in a few days, but that they received no further word from Dixon,
and her husband has not received the money. The witness testified
and at the close of the trial a verdict was returned.

Carl Dieckman, testifying for the People, stated that he was the Local Manager for the Illinois Bell Telephone Company at Champaign and Urbana, and had charge of the records of telephone calls made at that branch; that he knew the telephone number of a William H. H. Miller at Champaign, and identified the Champaign-Urbana telephone directory, showing at page 38 therein an entry W. H. H. Miller, 302 W. Clark street, number 8790, the directory being dated December, 1928. The witness then produced records of long distance calls from number 8790 at Champaign, showing numerous calls to Elaine at Longbeach 1956, Chicago, Illinois, on various dates during January and February, 1929, as well as several calls to Adcox at St. Louis during April and May, 1929.

Margaret Manes testified for the People that she was assistant Auditor of the Claridge Hotel, and had charge of the register sheet and the guest records of the hotel. She produced, and the State's Attorney introduced in evidence exhibits showing that L. M. Elaine was registered as a guest at the hotel March 7, 1929, and that Elaine and Miller were guests at the hotel April 10, 1929.

Various other witnesses, whose testimony is too lengthy to be detailed in this opinion, were offered by the state, tending to prove the charges laid by the indictment, among them being St. John Campbell, a clerk in the Department of Registration and Education, who stated that he knew Elaine and Miller, neither of whom were connected with the department in any capacity during the years 1928 and 1929; L. J. O'Grady, Local Manager of the Illinois Bell Telephone Company, in charge of the Edgewater Office for Chicago, Illinois, who testified that his area included within it the telephone number Longbeach 1956, and identified several long distance calls from that number to Elaine at St. Louis, Miller at Champaign and Adcox at St. Louis; Samuel Sparber, who corroborated the testimony of his wife with reference to the meeting of one Dixon at the Hotel La Salle, and the

last summer, following the New Orleans, La. 1935
he was the local manager for the Illinois Bell Telephone Company at
Champaign and Co., and was in the vicinity of Champaign and
at that time; and he was the telephone number 12 - 1111
H. E. Miller of Champaign, and identified the Champaign
telephone directory, showing as being in Champaign at 12 - 1111
Miller, 1211 N. Third Street, Champaign, Ill. The witness also stated
October, 1935. The witness also stated that he had seen
this type number 1211 of Champaign, showing numerous calls to
of Champaign, Ill. The witness also stated that he had seen
and 1211, and he was in Champaign at 12 - 1111
during 1935 and 1936.

Witness also testified for the people that the
residence address of the Miller family, and the change of the
register show and the great number of the calls. The witness
the State's attorney subpoenaed in evidence exhibits showing that
L. E. Miller was registered as a guest at the hotel from 1 - 1935,
and that Miller and Miller were guests at the hotel from 1 - 1935.

Various other witnesses, whose testimony is too lengthy
to be detailed in this manner, were witnesses of the events, leading
to prove the charges laid by the indictment, among them being Dr.
John Campbell, a clerk in the Department of Registration and Statistics
the State of Illinois and Miller, register of the year
connected with the Department in any capacity during the years 1931
and 1932; J. J. O'Grady, local manager of the Illinois Bell Telephone
Company, in charge of the Registrar Office for Chicago, Illinois, who
testified that he was located at 1211 N. Third Street, Champaign, Ill.
from 1931, and identified several long distance calls from 1211
number to Miller at St. Louis, Miller at Champaign and 1211 at St.
Louis; Samuel Warner, who corroborated the testimony of his wife
reference to the meeting of one Miller at the hotel at St. Louis, and the

payment of money to him in the basement of the hotel.

It is argued chiefly in support of the first contention made by defendant, that the record does not contain any evidence showing that Miller was ever in Cook County participating in any conspiracy, and consequently that he could under no circumstances be guilty of the offense as alleged in each count of the indictment, charging that he conspired, confederated and agreed with Mitchell Elaine to commit the offense of which he was convicted. In other words, defendant insists that one person in Sangamon County and another acting in Cook County, cannot be joined in an indictment for the crime of conspiracy in the latter county under Section 48 of the Criminal Code. The determination of this question necessarily depends upon the evidence, for under the decisions in this state, the venue of a conspiracy to do illegal acts is properly laid either in the county in which the unlawful agreement is made, or in any county in which overt acts were done by the alleged conspirators in carrying out the unlawful agreement. People v. Blumenberg 271 Ill. 120; People v. Glasberg, 326 Ill. 373. It, therefore, becomes a matter of inquiry to determine whether the state adduced sufficient competent evidence of overt acts committed by one of the conspirators in Cook County, to sustain the conviction. We believe it sufficiently appears from the foregoing resume of testimony and other facts and circumstances in evidence as shown by the record in this case, that numerous overt acts were committed by the conspirators in Cook County in furtherance of the unlawful agreement entered into in another county in this state. Among these appear the evidence of Adcox that he received a telephone call from Elaine stating that he, Elaine was in Chicago, making an appointment to meet Adcox at Springfield the following day; the evidence of Dora Sparber with reference to telephone calls received from Adcox in Chicago, inquiring whether she had the money for the old man, and her several talks and one

- 2 -

present of money to him in the presence of his family.

It is argued chiefly in support of the first contention made by defendant, that the record does not contain any evidence showing that Miller was ever in good family relationship in any capacity, and consequently that he could make no statement as to the character of the witness as alleged to have been at the defendant's house, that he conspired, conspired and agreed with Mitchell to commit the offense of which he was convicted. In other words, defendant claims that he never in any way knew the witness, and that he never, except as alleged in the indictment, was ever in contact with him in the latter county under section 44 of the Criminal Code. The defendant of this question necessarily rests upon the evidence. For under the decision in this state, the burden of a conviction is on the state, and it is the duty of the state to show that the alleged offense was done by the alleged conspirator in violation of the alleged agreement. People v. Miller, 221 Ill. 127; People v. Miller, 221 Ill. 127, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

visit with "Dixon" at her home in Chicago at which Sparber, her husband, filled out an application blank at Dixon's request, Dixon being identified from a photograph as Blaine, one of the conspirators; the further testimony of Mrs. Sparber and her husband, tending to show the payment of money to Blaine in the Hotel La Salle in Chicago; the testimony of Dieckman showing numerous telephone calls made from Miller's home to Chicago, and that of O'Grady confirming Dieckman's evidence.

As previously stated, it was incumbent upon the defendant to furnish a complete abstract of the evidence. Having failed to do so, any doubt arising from the evidence must be resolved against him, and it will be presumed on appeal that there was sufficient other competent evidence introduced to warrant the findings of the court. Moreover, upon an examination of the whole record and supplemental abstract, we regard the proof sufficient to sustain the verdict and judgment.

The only other assignment of error relates to an instruction offered on behalf of the People and given by the court. The instruction complained of reads as follows:

"You are further instructed that if you believe from all of the evidence in the case beyond a reasonable doubt that the defendant, William M. M. Miller, entered into a conspiracy as charged in the indictment with Mitchell Blaine, otherwise called L. M. Blaine, and further believe beyond a reasonable doubt from all the evidence that the agreement or conspiracy was entered into by defendant, William M. M. Miller, in some other County than Cook County, or in some other state, yet if you nevertheless find from the evidence beyond a reasonable doubt that one of the conspirators, Mitchell Blaine, came into Cook County and committed an overt act in Cook County in furtherance of the common design of the conspiracy then you may consider the conspiracy as if it had been originally made and entered into by the defendant in Cook County. In this respect it would make no difference that the defendant, William M. M. Miller was never in Cook County personally and never personally performed an overt act in Cook County."

visit with Wilson of her home in Chicago at which Herbert, her husband, lived and at which Wilson was at Wilson's present home being identified from a photograph as Wilson, one of the conspirators. The further testimony of Mrs. Herbert and her husband, tending to show the payment of money to Wilson in the hotel in Chicago. The testimony of witnesses showing numerous telephone calls made from Wilson's home in Chicago, and also to Chicago telephone.

and was immediately returned to the witness stand. The witness testified that he saw the defendant at the time of the shooting. He also testified that he saw the defendant at the time of the shooting.

The instruction concerning records as follows:

Instructions offered on behalf of the people and given by the court.

The only other assignment of error related to an in-

CONFIDENTIAL

In support of the objection urged to the foregoing instruction, defendant contends that it is only in a common law conspiracy that an act done in one county can give jurisdiction over a conspiracy formed in another county. This position is untenable, however, in our opinion. The conspiracies committed in the Glassberg and Blumenberg cases, *supra*, were statutory conspiracies, and the rule laid down by the court in those cases is not at variance with the principle and theory upon which the foregoing instruction was given by the court.

We find no reversible error in this record, and the judgment of the Criminal Court will therefore be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

In support of the objection urged to the foregoing investigation, defendant contends that it is only in a narrow and technical sense that an act done in one county can give jurisdiction over a conspiracy formed in another county. This position is untenable. However, in the instant case, the conspiracy was formed in the Kingsburg and Kingsburg areas, and, with respect to jurisdiction, the law is laid down by the court in those cases in not at variance with the principle and theory upon which the foregoing instruction was given by the court.

It is also no reversible error in this record, and the judgment of the trial court will therefore be affirmed.

RECORDED, INDEXED, FILED, AND SERIALIZED, 1934.

35043

FRED B. SNITE, Doing Business
as LOCAL LOAN CO., Not. Inc.,

(Plaintiff) Appellee,

v.

EAGLE TANK COMPANY, a Corporation,

(Defendant) Appellant.

59
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 628

Opinion filed Jan. 20, 1932

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit in the Municipal Court of Chicago against the Eagle Tank Company, a corporation, based upon an assignment of wages of Marius Hansen, an employee of defendant. The case was tried before the court without a jury, resulting in a finding and judgment for plaintiff in the sum of \$125.00 and costs.

It appears from the evidence that on September 20, 1927, Marius Hansen, then in the employ of the Eagle Tank Company, assigned to plaintiff 50% of his wages "earned or to be earned" as security for a loan of \$125.00. Upon default in the payment of this indebtedness, plaintiff on July 21, 1930, prepared and executed a notice addressed to Eagle Tank Company, advising the latter of the assignment of Hansen's wages, and directed one W. C. Molahan to deliver the notice to defendant. Molahan proceeded to the plant of the Eagle Tank Company, where Hansen was employed, and there had a conversation with J. A. Anderson, shop foreman. Molahan asked to see Hansen, and was advised by Anderson that Hansen was employed on an outside job, and under the rules of the company, could not be interviewed during working hours. Anderson thereupon interrogated Molahan as to the nature of his mission, and was told that Hansen owed some money and had defaulted in his payments, whereupon Anderson volunteered to go to Hansen's house and have a talk with him, to which Molahan assented. The assignment and notice was thereupon left with Anderson, who,

10000

THEY ARE NOT THE SAME AS THE OTHERS

(1911-12) (1912-13)

THEY ARE NOT THE SAME AS THE OTHERS

(1911-12) (1912-13)

Opinion filed Jan. 20, 1933

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The plaintiff brought suit in the District Court at St. Louis against the Eagle Iron Company, a corporation, and its officers and directors, for recovery of wages and damages. The complaint alleged that the plaintiff had been employed by the defendant company for a long period of time, and that he had been wrongfully discharged. He claimed that he was entitled to wages and damages for the period of his employment.

It appears from the evidence that on December 15, 1929, the plaintiff was employed by the defendant company. He was working as a laborer, and his wages were \$1.00 per day. He was discharged on January 1, 1930, without any notice.

The plaintiff claimed that he was entitled to wages for the period of his employment, and that he was entitled to damages for the wrongful discharge. He claimed that the defendant company had wrongfully discharged him, and that he was entitled to compensation for the loss of his job.

The defendant company denied the plaintiff's claims. It claimed that the plaintiff had been discharged for good cause, and that he was not entitled to wages or damages. It claimed that the plaintiff had been employed by the company for a short period of time, and that he was not entitled to compensation for the loss of his job.

The court found in favor of the plaintiff. It held that the plaintiff was entitled to wages and damages for the period of his employment. It held that the defendant company had wrongfully discharged him, and that he was entitled to compensation for the loss of his job.

The court awarded the plaintiff \$100.00 in wages and damages. It ordered the defendant company to pay the plaintiff this amount. The court also ordered the defendant company to pay the plaintiff's costs of suit.

according to his testimony, delivered these papers to Hansen without reading them.

The sole question presented for review is whether the proofs are sufficient to show a compliance with the statute on the question of the service of notice upon the employer. The statute upon which plaintiff bases his claim provides that:

"Under such assignment or order for the payment of future salary or wages given as security for a loan made under this Act, a sum of Fifty (50) per centum of the borrower's salary or wages shall be collectable by the licensee from the time that a copy thereof, verified by the oath of the licensee, or his agent, together with a verified statement of the amount unpaid upon such loan, has been served upon the employer."

Par. 30, Chap. 74, Cahill's, Ill. Rev. Stat., 1931.

Relative to the question of delivery of notice, the record discloses that Molahan made no effort to serve notice upon any officer or agent of the corporation, or to leave a copy thereof at defendant's office. He inquired for Hansen and delivered the notice to Anderson, the shop foreman, with the understanding that Anderson would speak to Hansen about the matter. W. O. Olsen, president of the Eagle Tank Company, testified that Anderson's duties consisted of the usual functions of a foreman; that he had charge of the employees, supervised their work, and made reports thereof to the office. He had nothing to do with issuing out pay checks, and his authority was limited to the supervision of the factory employees. Olsen further testified that he had not received a copy of the notice, and the matter had not been called to his attention.

Clarence W. Anderson testified on behalf of defendant that he was secretary of the Eagle Tank Company, in charge of its office; that he never received or had knowledge of any notice of assignment of Hansen's wages.

The testimony of the foreman, J. A. Anderson, and that of plaintiff's witness, W. O. Molahan, is in substantial accord as to

add evidence of interest and background information on the

THESE RESULTS ARE IN ACCORD WITH THE FINDINGS OF OTHER STUDIES.

1992, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 26

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(continued)

add the words "hereinafter" after "and" in the first sentence of paragraph 1.

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10. The committee of the Council of the League of Nations, which was established in 1919, was the first international organization to be created after the First World War.

To enter you to a school and to transfer record of study 112

the conversation that took place at the time the notice was left with the foreman, and indicates clearly that the notice was intended for Marius Hansen, the wage earner, and not for the Eagle Tank Company. The evidence likewise clearly discloses that the notice was delivered to Anderson, who gave the same to Hansen. While it is true that Holahan testified that he told the foreman to send the notice "up to the office", his statement is not consistent with his conduct at the time, for he admits that he went to the plant of the Eagle Tank Company in search of Hansen and told Anderson, the shop foreman, that he had come to see Hansen. Had Holahan gone to the defendant's place of business for the purpose of serving notice on the employer as required by statute, it is reasonable to assume that he would have gone to the office and there made inquiry as to the proper person to whom the notice should be delivered. Anderson, the foreman, delivered the notice to Hansen as he was requested to do, and there is no evidence that the same was ever delivered to any officer or agent authorized to act for the corporation.

The statute upon which plaintiff's claim is based requires that a verified copy of the assignment of wages, together with a statement of the amount unpaid, must be "served upon the employer." Under the requirement of this statute, it was incumbent upon plaintiff to serve the Eagle Tank Company by leaving a copy of the notice with an officer or agent of the defendant. The authority of J. A. Anderson was limited to his work in the shop. His duties, as defined by the president, were to assign work to the men, keep them busy and report to the office for orders. He had nothing to do with reference to pay checks, nor had he any authority to discharge a man without first conferring with Mr. Olsen, the president. Under these circumstances, we are of the opinion that the service of notice upon Anderson did not constitute valid service upon the employer as contemplated by the statute. In United Disposal Co. v. Industrial

Commission, 291 Ill. 480, there was involved a claim under the Workmen's Compensation Act. The question arose as to whether the service of notice upon a chief clerk constituted notice to the corporation. The clerk was employed as a timekeeper and shipping clerk, and as such, had charge of the loading platform and of the time books and other records at the plant. He kept account of the time of the employees, and under the direction of the superintendent hired and discharged men. The court held that because of the limitation of his authority, notice to him was not notice to the corporation, and in the course of its opinion, said:

"Notice to or knowledge of an agent while acting within the scope of his authority and in reference to a matter over which his authority extends is notice to or knowledge of the principal, but in order to be binding upon the principal the knowledge must be acquired while the agent is acting within the scope of his authority and in reference to a matter over which his authority extends. (4 Fletcher's Cyc. Corp. 2214). The information imparted by Taylor to Franks did not bind the plaintiffs in error."

Adams Express Company, v. Oglesby, 215 Ill. App. 94, and People v. Gullborg, 324 Ill. 538, are to the same effect.

There being no other assignments of error the judgment of the Municipal Court will be reversed with findings of fact here.

REVERSED WITH FINDINGS OF FACT HERE.

HEBEL, P.J. AND WILSON, J.: CONCUR.

We find as a matter of fact that no notice of the assignment of Hansen's wages to plaintiff was served upon defendant as provided by Par. 30, Chapter 74, Cahill's Illinois Revised Statutes of 1931.

Continued, Vol. III, 600, there was involved a claim under the
patent's application for the machine used in the
service of notice upon a chief clerk constituted notice to the com-
missioner. The clerk was employed as a stenographer and signing clerk,
and had charge of the loading station and of the time books and
other records of the plant. He kept records of the time of the
employees, and under the direction of the superintendent filed and
discharged them. The court said that because of the limitation of
his authority, which he had not notice to the superintendent, and
in the course of the system, which

"It is not an invention of an agent or a
vice of the power of his authority but is an invention of a
over which the authority extends as notice to the
the principal, but is not to be limited by the
the knowledge must be obtained while the power is
within the scope of his authority and is not to be
after even when his authority extends, it is not to be
not to be limited by notice to the
and not to be limited by notice."

These provisions, however, are subject to the
California, Vol. III, 600, and the same effect.

There being no other assignment of error the judgment
of the trial court will be affirmed with interest at that rate.
The court is divided 4 to 3.

HUGHES, P. J. AND SIMON, J. CONCUR.
We find as a matter of fact that no notice of the
assignment of Hansen's wages to plaintiff was served upon defendant
as provided by law. The assignment was not served
within of time.

35057

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

ALBERT HOFFMAN, ROBERT VAN NESS,
and ROBERT REED,

Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 628²

Opinion filed Jan. 20, 1932

MR. JUSTICE FRIEND delivered the opinion of the court.

The defendants, Albert Hoffman, Robert Van Ness and Robert Reed, were charged in an information filed in the Municipal Court of Chicago with keeping a common gaming house, and permitting certain persons to gather and play a game of chance for money. The information is based upon a violation of Paragraph 305, Chapter 38, Cahill's Revised Statutes for 1929. The arrests were simultaneously made in the same place, and all three cases were tried together in the Municipal Court pursuant to a waiver of jury by each defendant. At the conclusion of the hearing, the court found all of the defendants guilty, denied their motions for new trials, and in arrest of judgment, and assessed a fine of \$100.00 in each case. By the several writs of error, which were consolidated for hearing in this court, the defendants seek to reverse the judgments thus rendered against them.

It appears from the evidence, which is the same as to all of the defendants, that police officers, George Mankowsky and Frederick Fertig, visited the premises at 950 West Madison Street, in the City of Chicago, on December 17, 1930; that said premises consisted of a cigar store and back room; that about five men were present in the cigar store, and Reed, who was standing behind the counter, together with the defendants, was examining some sheets introduced as state exhibits #1 and #3, which Reed was checking in

the presence of the persons standing at the counter when the officers entered the premises. Mankowsky testified that he spoke to Reed and inquired how long he had been running a handbook there, to which Reed replied, "We have only been going here a short time." The witness described the states exhibits as jockey sheets, containing the names of horses, the numbers of the races and the lengths of the distances to be run. The witness saw no money passed and heard no bets being made. Mankowsky testified further that after interviewing Reed, he walked into the room to the rear of the cigar store where he found the defendants Van Ness and Hoffman and that he heard these two defendants state to Officer Hoffman who also accompanied Mankowsky and Fertig, that they had been running a handbook on the premises for about six months.

Officer Fertig testified that he accompanied Mankowsky when the arrest was made; that there was a crowd of about five men in the cigar store at the time the officers entered; that there were two telephones in the small room back of the cigar store where defendants, Van Ness and Hoffman, were found; that Van Ness said they had been running a handbook for about six months; that he, Van Ness, answered the telephone calls and took care of the service; that the defendant, Hoffman, told Officer Hoffman that he was the owner of the premises and had been running a handbook there for about six months.

Albert Hoffman, one of the defendants, testified that he had been engaged in selling cigars at 350 West Madison Street for about six months prior to his arrest; that to his knowledge, a bet was never solicited or made in the cigar store or in the back room; that he made none of the notations on any of the sheets offered in evidence by the state as exhibits #1 and #2, and denied stating to Officer Mankowsky that he had been running a handbook for six months.

Office being testified that he accompanied [redacted] when the arrest was made; that there was a crowd of about five men in the office at the time the officers entered; that there were two telephones in the small room west of the cigar store where telephoned, Van Ness and Hoffman, were found; that Van Ness is [redacted] they had been reading a handbook for about six months; that he, Van Ness, answered the telephone calls and took care of the delivery; that the defendant, Hoffman, will deliver Hoffman 12-1 as well as the order at the premises and has been buying a quantity since the [redacted] last six months.

[illegible]

Defendant Van Ness testified he was employed by Hoffman as a clerk in his cigar store located at 930 West Madison Street, and denied having ever seen state's exhibits #1 and #2 prior to the trial, or making any of the notations or figures upon any of the sheets; that he was standing in the back room with the defendant, Hoffman, when the arrests were made; that he did not hear Hoffman state to Officer Mankowsky that he, Hoffman, had been running a handbook for six months or any other length of time; that the two telephones in the rear room were intended for incoming as well as outgoing calls.

Defendant Reed testified that he was also employed by Albert Hoffman as a clerk in the cigar store and stated he was busy behind the counter waiting on customers when the arrest was made. The witness denied making any notations on the face of exhibits #1 and #2, and stated he had never made or solicited a bet upon said premises and had never seen any other person making or soliciting a bet. Reed denied telling Officer Mankowsky that he had been running a handbook upon the premises.

State's exhibit #2 is a printed sheet bearing the heading "Jefferson Park", and contains six columns, in each of which appears the names of horses, together with their jockeys, and the weights allotted to each horse. At the head of each column appears the number of the race and the distance to be run. Part of the reading matter in each column appears to be printed, in addition to which there are written notations and figures evidently inserted by pencil or pen. On the back of exhibit #2 appears state's exhibit #1 containing three columns of figures, which are unexplained in the record.

As grounds for reversal, it is first urged that the findings and judgment of the court are contrary to the weight of the evidence. Defendants argue that the corpus delicti of the specific

...the fact that the ...
...in his right state ...
...and denied having ever seen ...
...to the fact of ...
...the ...
...that he did not ...
...state to ...
...handbook for six months or any other ...
...telephones in the room were intended for ...
...outgoing calls.

...testified that he was also ...
...in the right state ...
...the ...
...The witness denied asking any ...
...and ...
...examined and had never seen any other person ...
...but ...
...a handbook upon the premises.

...as a ...
...the "Telephone ..."
...appears the names of ...
...rights ...
...the number of ...
...reading matter in each ...
...which ...
...general on ...
...certain three columns of ...
...record.

...in ...
...findings and judgment of the court are contrary to the weight of the ...
...evidence.

offense of keeping a common gaming house as defined by the statute, is the actual and overt act of "keeping" or superintendence of the premises described in the information for the illegal purpose; and that as an essential prerequisite to a valid conviction the evidence must show, beyond a reasonable doubt, that the defendants actively and overtly exercised the care or management of, or had custody or superintendence or control over the premises for the illegal purpose. In this connection it is urged that the alleged admissions of the defendants are the only proof in the record of the corpus delicti and the only evidence showing that a common gaming house had been kept and that defendants had custody or control or charge of the premises. We cannot agree with this conclusion, however. The undisputed evidence disclosed that Hoffman was the owner of the premises, that Reed and Van Ness were employed by him and that all three were present when the arrest was made. The proof further shows that Reed was behind the counter, either checking or examining the Jockey Sheets in the presence of five men, congregated there and that Hoffman, the owner, and Van Ness, his clerk, were in the back room with two telephones there installed to receive calls in connection with the enterprise. These are all circumstances which were properly considered by the court in connection with the testimony of the officers as to the alleged admissions and were competent to establish the corpus delicti. Stevens v. People, 67 Ill. 687.

It is also contended that extra-judicial confessions alone may not be used to prove the corpus delicti and People v. Maruda, 314 Ill. 537, is cited to sustain the proposition. In that case there was no evidence other than the admission of the defendant to a police officer. In the instant case proof of other circumstances was made, and as stated in the Maruda case, "It (the corpus delicti) may, however, be proved by circumstantial evidence. (Campbell v.

offense of keeping a common gaming house as defined by the statute, is the actual and overt act of "keeping" or superintending of the premises described in the information for the illegal purpose; and that as an essential prerequisite to a valid conviction the evidence must show, beyond a reasonable doubt, that the defendant actively and overtly exercised the care or management of, or had custody or superintendence of, the premises for the illegal purpose. In this connection it is urged that the alleged admission of the defendant to the club in the month of May, 1937, is not sufficient and the only evidence showing that a common gaming house had been kept and that defendant had custody or control or charge of the premises. He cannot agree with this conclusion, however. The undisputed evidence discloses that defendant was the owner of the premises, that he and his wife were employed by him and that all their were present when the first was made. The record further shows that he was behind the counter, either checking or examining the money placed in the pockets of live men, congregated there and that defendant, the bank, and Van Ness, his clerk, were in the room. These facts are undisputed and are sufficient to establish the fact that defendant was the owner of the premises and that he was in control of the premises. It is also contended that extra-judicial confessions alone may not be used to prove the offense defined in the statute. This is also the position of the law. In this case there was no evidence other than the admission of the defendant to a police officer. In the instant case proof of other circumstances was made, and as stated in the brief case, "It is the law that a confession, if proved by circumstantial evidence, (People v. ...)

People, 159 Ill. 9; People v. See, 236 Id. 153; People v. Goodwin, 383 Id. 99), and an extra-judicial confession may be considered, in connection with other evidence, to establish the corpus delicti, and if the evidence of other facts and circumstances so fully corroborates the confession as to show the commission of the crime beyond a reasonable doubt, may be sufficient (Johnson v. People, 197 Ill. 48)". Hoffman was the owner of the premises, Van Nese was employed by him and Reed, who was present behind the counter in the front part of the premises was also Hoffman's clerk. These undisputed facts, together with the presence of gambling paraphernalia upon the premises are circumstances, outside of the admissions, which the court properly considered in determining whether defendants had custody or control of the premises, and whether a common gaming house was kept.

It is further urged that the guilt of defendants was not established beyond a reasonable doubt, because all three defendants testified in their own defense and denied the testimony given by the officers. There was conflict of testimony in a criminal case, however, depending upon the credibility of witnesses, does not as a matter of law raise a reasonable doubt. Connaghan v. People, 88 Ill. 460; People v. Erickson, 338 Ill. 543.

It is lastly urged that there is a fatal error in the finding of the court. The information filed is a one count information, alleging in substance that defendants kept a common gaming house and therein permitted certain persons to come together to play at a game of chance. Based upon this information, the court made the following finding:

"The court finds the defendant guilty in manner and form as charged in the first count of the information herein. Wherefore, it is ordered that the same be entered of record herein."

It has been held that a jury's verdict is sufficient if the intention of the jury can be ascertained with reasonable certainty, and all

reasonable intendments will be indulged in to sustain the verdict, People v. Quesada, 310 Ill. 467. It has likewise been held that a judgment of conviction for visiting a place used for cock-fighting is responsive, which finds the defendant guilty of a violation of Section 52, Chapter 38, of the Illinois Revised Statutes in manner and form as charged in the information, and that a finding that defendant was guilty of an offense for which he was not charged, namely "cock-fighting", may be rejected as surplusage. In Armstrong v. People, 37 Ill. 459, where the trial court in entering a judgment upon a verdict in a criminal case, which found the defendant guilty, and in addition to fixing the term of imprisonment, which it might do, also imposed a fine which a jury could not do, adopted the entire verdict, it was held that the court having the power to impose the fine, its judgment would be none the less valid because of the adoption of the amount improperly fixed in the verdict. The court said, "This part of the verdict then, must be held as surplusage, and as such, not vitiating the other part which the jury properly found." Under the authority of these decisions, we are of the opinion that the words in the court's finding "first count of the" may be disregarded as surplusage, thus eliminating the objectionable feature of the finding.

For the reasons herein stated, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

responsible instruments will be included in so various the verdict.
People v. ... 310 Ill. 687. It has likewise been held that a
judgment of conviction for visiting a place used for cock-fighting
is responsive, which finds the defendant guilty of a violation of
Section 28, Chapter 28, of the Illinois revised statutes in manner
and form as charged in the information, and that a finding that
defendant was guilty of an offense for which he was not charged,
namely "cock-fighting," may be rejected as irrelevant. In People v. ...
310 Ill. 687, where the facts were as follows: "Judgment
was a verdict in a criminal case, which found the defendant guilty,
and in which the jury found the facts of the information, and in which
the jury found a fine which was held to be correct, and the verdict
was held to be correct having the power to return the
fine, its judgment would be none the less valid because of the
adoption of the same verdict. It is the finding. The court
said, 'This part of the verdict then, must be held as correct,'
and as such, and finding the other part of the verdict
found." Under the authority of these decisions, we are of the opinion
that the words in the county's finding "first count of the" may be
struck out as surplusage, thus eliminating the objectionable
feature of the finding.
For the reasons herein stated, the judgment of the
county court will be affirmed.

REVEREND.

WILLIAM W. ...

35058

617

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

ROBERT VAN NESS,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 628³

Opinion filed Jan. 20, 1932

MR. JUSTICE FRIEND delivered the opinion of
the court.

This case is consolidated with Cases No. 35057
and No. 35059. The facts in all three cases are the same and the
conclusions reached in Opinion No. 35057 are applicable to
this proceeding. The judgment of the Municipal Court will be
affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

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3264 I.A. 633

Opinion filed Jan. 30, 1933

THE COURT

THE COURT

THIS CASE IS REMOVED FROM THE COURT

AND SO ORDERED. The Court is all these cases are the same and the

opinion is written in opinion 32, 33 and 34

this proceeding. The payment of the interest will be

affirmed.

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35059

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ROBERT REED,
Plaintiff in Error.

627
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 6284

Opinion filed Jan. 20, 1932

MR. JUSTICE FRIEND delivered the opinion of
the court.

This case is consolidated with Cases No. 35057
and No. 35059. The facts in all three cases are the same and the
conclusions reached in Opinion No. 35057 are applicable to this
proceeding. The judgment of the Municipal Court will be
affirmed.

AFFIRMED.

HEBEL, F.J. AND WILSON, J. CONCUR.

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DEPARTMENT OF THE TREASURY

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UNITED STATES

OFFICE OF THE SECRETARY

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DEPARTMENT OF THE TREASURY

Opinion filed Jan. 20, 1933

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UNITED STATES

DEPARTMENT OF THE TREASURY

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UNITED STATES

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35067

FRED J. JAMES,

(Plaintiff) Appellee,

v.

FRED BOWRA and L. A. WELLS and
H. T. WELLS, co-partners doing
business as WELLS BROTHERS,

(Defendants) Appellants.

63
APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

264 I.A. 629'

Opinion filed Jan. 20, 1932

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit in the Superior Court of Cook County against defendants, two of whom are co-partners, for damages alleged to have been sustained by him on October 4, 1929, while on the premises of defendants, Wells, caused by the backing upon plaintiff of an automobile which was driven by the defendant, Bowra. The jury found all three defendants guilty and assessed the plaintiff's damages at \$5,000.

The declaration, consisting of but one count, alleges that the defendants, Wells, conducted a garage, and as a part thereof maintained a pit with runways for the purpose of permitting mechanics to work underneath automobiles; that plaintiff drove his car on one of said runways for the purpose of having work done by said defendants, Wells; that the automobile of the defendant, Bowra, was then and there standing upon said runway adjoining that occupied by plaintiff's car; that Bowra was sitting in his automobile, which fact was unknown to plaintiff; that plaintiff was standing on a runway directing Wells as to work to be done on plaintiff's car and was in the exercise of ordinary care for his own safety; that it was the duty of Bowra to exercise reasonable care in the operation of his automobile so as to avoid injury, and the duty of Wells to exercise reasonable care in and about avoiding injury to plaintiff while he was rightfully and lawfully upon their premises, and

FILED 1. JAN 1933

(RECEIVED)

THIS COURT AND I HAVE READ THE
PETITION FOR WRIT OF HABEAS CORPUS
AND THE ANSWER THERE TO.

(RECEIVED)

Opinion filed Jan. 30, 1933

THE COURT HAS DELIVERED THE OPINION OF THE COURT.
 REPLYING HERETOIN IN THE COURT OF THE
 COUNTY AGAINST DEFENDANTS, TWO OF WHOM ARE CO-DEFENDERS, FOR DAMAGES
 ALLEGED TO HAVE BEEN SUSTAINED BY HIM ON OCTOBER 4, 1932, WHILE ON
 THE PREMISES OF DEFENDANTS, WHICH, CAUSED BY THE BACKING UPON PLAIN-
 TIFF OF AN AUTOMOBILE WHICH WAS DRIVEN BY THE DEFENDANT, HENRY. THE
 JURY FOUND ALL THREE DEFENDANTS GUILTY AND ASSESSED THE PLAINTIF'S

THE DECISION, CONSISTING OF BUT ONE COUNT, ALLEGES
 THAT THE DEFENDANT, HENRY, CONDUCTED A GARAGE, AND AS A PART THEREOF
 MAINTAINED A PIT WITH RUNWAYS FOR THE PURPOSE OF PERMITTING AUTOMOBILES
 TO WORK UNDERNEATH AUTOMOBILES; THAT PLAINTIF DROVE HIS CAR ON ONE
 OF SAID RUNWAYS FOR THE PURPOSE OF HAVING WORK DONE BY SAID DEFEN-
 DANT, HENRY; THAT THE AUTOMOBILE OF THE DEFENDANT, HENRY, WAS THEN
 ON THE OTHER SIDE OF SAID RUNWAY ADJOINING THAT OCCUPIED BY
 PLAINTIF'S CAR; THAT HENRY WAS SITTING IN HIS AUTOMOBILE, WHICH
 WAS UNKNOWN TO PLAINTIF; THAT PLAINTIF WAS STANDING ON A
 RUNWAY DIRECTING HENRY AS TO WORK TO BE DONE ON PLAINTIF'S CAR
 AND WAS IN THE EXERCISE OF ORDINARY CARE FOR HIS OWN SAFETY; THAT
 IT WAS THE DUTY OF HENRY TO EXERCISE REASONABLE CARE IN THE OPERATION
 OF HIS AUTOMOBILE SO AS TO AVOID INJURY, AND THE DUTY OF HENRY
 TO EXERCISE REASONABLE CARE IN AND ABOUT AVOIDING INJURY TO PLAIN-
 TIF WHILE HE WAS RIGHTFULLY AND LAWFULLY UPON THEIR PREMISES, AND

and to warn plaintiff that the automobile of defendant Bowra was occupied and about to be operated and moved; that defendant Bowra negligently and recklessly drove his automobile there, and the defendant Wells carelessly and negligently failed to give plaintiff any warning whatsoever, prior to and at the time of the accident that the automobile of Bowra was occupied and about to be operated and driven, and by reason of the joint negligence of the defendants as aforesaid, the automobile of Bowra was driven upon and against plaintiff with great force and violence, causing him severe injuries.

To this declaration, the defendants filed a plea of the general issue, and the defendants Wells also filed a special plea denying possession and operation of the automobile which caused the injury.

The essential facts disclose that the defendants, L.A. Wells and H. T. Wells, co-partners, doing business as Wells Brothers, were engaged in operating a garage at 6719 South Chicago Avenue, in the City of Chicago, which was located on the north side of the street facing the southwest, and set back about 40 feet from the sidewalk. In the space between was a yard about 125 feet long. To the right and outside the entrance of the center door of the garage was a pit 24 feet long, 18 feet wide and 4½ feet deep. Over this pit and level with the ground were two runways, or skids, running northeasterly and southwesterly. Each runway consisted of two tracks, which were made of I-beams 8½ inches wide with a flange 4½ inches high to accommodate the tires of automobiles. Each runway was constructed to hold two cars at the same time and was used to enable mechanics to work underneath the cars. A railing and sidewalk 2½ feet wide extended the entire length of the pit on the north side, nearest the entrance to the garage, and immediately adjacent to the pit. This walk was used by patrons who drove on the north runway. Those using the south runway could step out of their

and to whom plaintiff that the automobile of defendant was occupied and about to be operated and moved; that defendant drove negligently and recklessly drove his automobile there, and the defendant while recklessly and negligently failed to give plaintiff any warning whatsoever, prior to and at the time of the accident that the automobile of defendant was occupied and about to be operated and driven, and by reason of the joint negligence of the defendant as aforesaid, the automobile of defendant was driven upon and against plaintiff with great force and violence, causing him severe injuries.

In this connection, the defendant filed a plea of the general issue, and the defendant Wells also filed a special plea denying possession and operation of the automobile which caused the injury.

The material facts pleaded by the defendant, Wells and J. T. Wells, respectively, being material to this action, were averred in operating a garage at 2719 North Chicago Avenue, in the City of Chicago, which was located on the north side of the street facing the southeast, and set back about 60 feet from the sidewalk. In the space between was a yard about 125 feet long. To the right and outside the entrance of the corner door of the garage was a pit 24 feet long, 12 feet wide and 4 feet deep. Over this pit ran down with the ground were two concrete, or masonry, curbs, one on each side of the pit, which were 12 inches wide with a flange of 12 inches high to accommodate the tires of automobiles. These curbs were constructed to hold two cars at the same time and was used to enable one to work underneath the car. A railing and sidewalk ran along the entrance to the garage, and immediately adjacent to the pit was a concrete curb 12 inches high and 12 inches wide. This curb was used by persons who drove on the street. These facts were averred by the defendant Wells and J. T. Wells, respectively, and were admitted by the

cars onto the ground on the south side of the pit. From the center door of the garage, and extending across the front of the pit alongside the wall of the garage was a walk from which several steps led to the bottom of the pit between the north and south runways.

It appears that on October 4, 1929 at about 3 o'clock in the afternoon plaintiff drove his automobile into the yard in front of Wells' garage, and told H. T. Wells to look at his transmission and fill it with grease. He was directed by Wells to drive onto the runway. At that time another car was on the nearest or north runway up next to the garage. Plaintiff drove his car behind it on the same runway, but only partly over the pit, the rear wheels resting on the ground. Wells went inside the garage to get his tools, and while there defendant Bowra drove his car onto the south runway up next to the garage, to have the heater tightened. Wells had gone down in the pit under plaintiff's car and was engaged in checking the transmission and filling same with grease. Other than Wells, no one was in the pit, and none of the motors were running while the work on either car was being done. When the mechanic working on Bowra's car had finished, he went in to the garage, but did not see plaintiff. Bowra then stepped into his car, started the motor, looked into his back-vision mirror, and started back slowly. He backed up several feet, heard someone yell "Stop", then pulled ahead and backed again, heard another yell, and put on his brakes. While all of this was transpiring, Wells was underneath plaintiff's car engaged in work on the transmission.

It further appears from the evidence that while the work was being done on the two cars, plaintiff, without being observed by anyone, stepped out of his car, walked around the rear end of it, and assumed a squatting position on the north track of the south runway in the rear of Bowra's car, facing his own automobile. While

came onto the ground on the south side of the pit. From the center door of the garage, and extending across the front of the pit along side the wall of the garage was a walk from which several steps led to the bottom of the pit between the north and south runways.

It appears that on October 4, 1933 at about 3 o'clock

in the afternoon Plaintiff drove his automobile into the yard in front of the garage, and that L. V. Wells, who was in the car, and that it was driven by Wells to drive onto the

up next to the garage. Plaintiff drove his car behind it on the

rear runway, but only partly over the pit, the rear wheels resting

on the ground. Wells went inside the garage to get his tools, and

while these defendant Jones drove his car onto the south runway up

next to the garage, to have the heater lightened. Wells had gone

down to the pit under Plaintiff's car and was engaged in checking

the transmission and filling same with oil. From that time

no one was in the pit, and none of the motors were running while

the car on either side was being driven. After the engines started

on Jones's car had finished, he went in to the garage, but did not

see Plaintiff. Jones then stepped into his car, started the motor,

looked into his back-view mirror, and started back slowly. He

drove to where the car was, and then turned back slowly.

When he looked back, he saw another car, and was on his brakes.

While all of this was transpiring, Wells was standing in Plaintiff's

car engaged in work on the transmission.

It further appears from the evidence that while the

work was being done on the two cars, Plaintiff, without being observed

by anyone, stepped out of his car, walked around the rear end of it,

and assumed a peering position on the north track of the south

runway in the rear of Jones's car, facing his own automobile. Wells

plaintiff was still in a squatting position, and about to get up, he saw Bowra's car moving toward him about 7 or 8 feet away. He yelled, but made no effort to get up or out of the way, and remained in this same position until the left rear tire of Bowra's car came in contact with his right foot, causing the injury complained of.

No brief has been filed by defendant Bowra, but on his motion an order was here entered consolidating the two appeals, and ordering the brief of the defendants, Wells Brothers, to also stand for the defendant Bowra.

So far as the defendants, Wells, are concerned, the gravamen of plaintiff's claim is that they failed to warn him of the danger that Bowra's car was occupied, and about to be operated and driven. The defendants insist, however, that plaintiff failed to allege or prove that defendants had knowledge of plaintiff's dangerous position, or that in the exercise of ordinary care for plaintiff's safety, they should have known of it. It is undoubtedly the rule in this state that on demurrer a declaration is construed against the pleader, but after the verdict all intendments and presumptions are in its favor; that if a declaration contains terms sufficiently general to include by fair and reasonable intendment, any matter necessary to be proved and without proof of which the jury could not have given the verdict, the want of an expressed averment of such matter is cured by the verdict. Where, however, no cause of action is stated in the declaration, and it is so defective that it will not sustain a judgement, such defects may be taken advantage of on appeal or error, Sargent Co. v. Danblia, 215 Ill. 428. In the instant case, if the defendants Wells are liable for the injuries sustained by plaintiff, the liability must be based upon the theory that they have committed a wrong, or have neglected some duty,

plaintiff was still in a crouching position, and about to get up.
He saw Bowyer's car moving toward him about 7 or 8 feet away. He
cried, but made no effort to get up or out of the way, and remained
in this same position until the left rear tire of Bowyer's car
came in contact with his right foot, causing the injury complained
of.
The trial has been filled by defendant's experts, but on
his motion an order was here entered consolidating the two appeals,
and ordering the trial of the defendants, Wells Brothers, to also
take place for the defendant's cause.
So far as the defendants, Wells, are concerned, the
question of plaintiff's claim is that they failed to warn him
of the danger that Bowyer's car was occupied, and about to be operated
and driven. The defendants insist, however, that plaintiff failed
to allege or prove that defendants were negligent as to plaintiff's
dangerous position, or that in the exercise of ordinary care for
plaintiff's safety, they should have known of it. It is respectfully
the rule in this state that on demurrer a description is considered
against the pleader, but after the verdict all inferences and
presumptions are in its favor; that if a description contains facts
sufficiently general to include by fair and reasonable inference,
any matter necessary to be proved and without proof of which the
jury could not have given the verdict, the want of an express
avowment of such matter is cured by the verdict. Where, however, no
cause of action is stated in the description, and it is no defective
that it will not sustain a judgment, such defects may be taken
advantage of on appeal or error. *WELLS BROS. v. BOWYER*, 102 Ill. 122.
In the instant case, if the defendants Wells are liable for the in-
juries sustained by plaintiff, the liability must be based upon the
theory that they have committed a wrong, or have neglected some duty.

and that a direct or consequential injury has resulted from the negligent performance or omission of that duty. The sole negligence charged against these defendants is the failure to warn; there is no allegation that defendants knew, or by the exercise of ordinary care, could have known that plaintiff was in a position of danger in sufficient time to have warned him thereof. It would, therefore, follow that if defendants are not charged with such knowledge, there could be no duty on their part to look out for or warn plaintiff.

A similar question arose in the case of McAndrews v. C. L. & E. Ry. Co., 223 Ill. 232, where the declaration contained but one count and charged that the defendant, without giving any warning to plaintiff, shoved certain cars against the car on which plaintiff was standing, as a result of which plaintiff was injured. In discussing the same point as that raised in the instant case, the court stated the rule as follows:

"In actions of the character of this it is necessary to aver and prove three elements to make out a cause of action: (1) the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure of the defendant to perform that duty; and (3) an injury to the plaintiff resulting from such failure. When these three elements concur they unitedly constitute actionable negligence, and the absence of any one of these elements, either in the declaration or proof, renders the declaration insufficient to sustain a judgment for negligence, even after the verdict or the proof to establish a cause of action involving actionable negligence (Schueler v. Mueller, 193 Ill. 402; Mackey v. Northern Milling Co., 210 id. 115; Faris v. Hoberg, 134 Id. 269); and it is not sufficient in the declaration to allege that it is the duty of the defendant to do certain things, as that would be but the averment of a conclusion, but the declaration must state facts from which the law will raise the duty."

In Mackey v. Northern Milling Co., 210 Ill. 115, plaintiff's intestate who was in the defendant's employ was lawfully upon a certain sidetrack used by defendant, and was in the exercise of due care, when another defendant, not a fellow servant of the plaintiff, pushed a car upon him, causing injuries which resulted in

plaintiff's intestate death. The court held that the declaration was defective and insufficient to support a judgment because it failed to show that defendant owed Mackey some duty, which was violated.

In Vogrin v. American Steel & Wire Co., 179 Ill. App. 245, it was held that a declaration was fatally defective which failed to state that defendant knew or ought to have known in the exercise of ordinary care, that plaintiff, who was injured, was on the runway in the performance of his duty at the time of his injury.

Plaintiff admits that it is necessary to allege and prove a duty owed by defendants to the plaintiff and apparently relies upon the rule of law which requires an owner of property to exercise reasonable care for the safety of those who are invited upon his premises to transact business. This rule has its limitations, however for as stated in Pauckner v. Wakem, 231 Ill. 276, a case cited and relied upon by plaintiff, "the duty to one who comes thereon by the owner's invitation to transact business in which the parties are mutually interested is to exercise reasonable care for his safety while on that portion of the premises required for the purpose of his visit." Therefore, in order to avail himself of the advantage of the foregoing rule, it was incumbent upon plaintiff to prove that he assumed the position on the runway in the rear of Bowra's car at the defendant's invitation, and plaintiff seems to recognize this requirement of proof because he insists that Wells directed him to assume the position thus occupied by him when the accident occurred. We have carefully examined the abstract of record as well as the record itself to ascertain the facts relating to this circumstance.

It appears from plaintiff's own testimony that when he drove upon the premises in question, the defendant, H. T. Wells, was

plaintiff's interest failed. The court held that the decision was correct and insufficient to support a judgment because it failed to show that defendant acted with any wrongful intent.

Reversed.

In Franklin v. Franklin, 100 Cal. 471, 34 P. 2d 471.

At the time that a partnership was formed between the plaintiff and the defendant, the plaintiff was a resident of California and the defendant was a resident of another state. The plaintiff was the owner of a certain piece of property and the defendant was the owner of another piece of property. The plaintiff and the defendant entered into a partnership agreement which provided that the plaintiff was to manage the business and the defendant was to provide the capital. The plaintiff and the defendant entered into a partnership agreement which provided that the plaintiff was to manage the business and the defendant was to provide the capital.

There is a great deal of evidence in this case which tends to show that the plaintiff and the defendant entered into a partnership agreement which provided that the plaintiff was to manage the business and the defendant was to provide the capital. The plaintiff and the defendant entered into a partnership agreement which provided that the plaintiff was to manage the business and the defendant was to provide the capital.

It is also to be noted that the plaintiff and the defendant entered into a partnership agreement which provided that the plaintiff was to manage the business and the defendant was to provide the capital. The plaintiff and the defendant entered into a partnership agreement which provided that the plaintiff was to manage the business and the defendant was to provide the capital.

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in the yard and plaintiff told him to inspect his transmission; that Wells directed plaintiff to drive onto the runway; that there was another automobile on the same runway in front of his car, and plaintiff occupied only so much of the runway as was necessary to enable Wells to gain access to the transmission of the car from the pit underneath the runway. Wells then proceeded to the front end of the pit immediately adjacent to the garage where steps led down into the pit, and while plaintiff was still seated in his car, descended into the pit to inspect the transmission. After Wells had disappeared from the view of plaintiff, the latter stepped out of his car on the left side, where a sidewalk approximately 2 feet in width was provided for that purpose, walked around the rear end of his car and onto the I-beams of the runway immediately to the south of plaintiff's car, there assuming the squatting position in the rear of Bowra's car, which he occupied for about 2 minutes, as he states, and until the accident occurred.

With reference to the contention that Wells directed him to assume this position, the record discloses the following evidence from which we quote at length:

"Q. Now, when Mr. Wells came, what happened after that? What did he do or say to you?

A. He motioned for me to come on; to get off of the car and come around. I got out of the car and stepped around the runway -- next to my car.

Q. And what after that? How did you come to get that close on the runway, Mr. James?

A. Well, there was no way to see under the car --

MR. JACKSON: Just a moment, if your Honor please.

A. -- from the north side on account of a walk running there.

MR. SCOTT: Q. Did you get any instruction or motion by word or mouth --

in the yard and himself told him to inspect his translation; that
Wells directed himself to drive over the runway; that Wells was
another responsible on the same runway in front of his car, and
himself located only as much of the runway as was necessary to
enable Wells to give notice to the translation. It was then that
his understanding the runway. Wells then proceeded to the front end
of the pit immediately adjacent to the runway where Wells had been
told the pit, and Wells himself was still seated in his car.
descended into the pit to inspect the translation. After Wells had
disappeared from the view of himself, the latter stepped out of
his car on the left side, where a slightly apprehensive I had to
think was involved the last purpose, which proved the fact that it
his car and into the 1-2-3-4 of the runway immediately to the south
of himself's car, where he remained for sometime waiting in the way
at Wells's car, where he remained for about 2 minutes, as he waited,
and still the situation continued.

Wells returned to the position that Wells himself
was in when this position, the record discloses the following evi-
dence from which we know of location:

Q. Now, when Mr. Wells went, what happened after
that? Did he go to the pit?

A. He returned to the pit and he was not at the
end of the runway, I was not at the end of the runway
the runway - I was at the pit.

Q. And what after that? Was he then seen to get
that close on the runway, Mr. James?

A. Well, there was no way to see under the car -

MR. JAMES: Just a moment, if your honor please.

A. -- from the north side on account of a wall
existing there.

MR. JAMES: Did you get any indication as
whether or not he went -

MR. JACKSON: I object to that.

MR. SCOTT: Q. - - from Mr. Wells?

A. Yes, when he came - -

MR. JACKSON: Just a moment. That is objected to, if the court please.

THE COURT: I sustain the objection.

MR. SCOTT: Q. What did Mr. Wells do or say?

A. He motioned for me to come on this other runway.

Q. Did you do that? A. Yes, sir.

MR. JACKSON: I object. Just a moment. I move that he motioned for me to come around on the runway go out. He can state that he motioned.

THE COURT: Yes.

MR. JACKSON: But I will ask that he motioned - -

THE COURT: Stricken out.

MR. SCOTT: Q. Did he point to anything when he motioned, to any particular place?

MR. JACKSON: That is leading. This witness should be permitted to state.

THE COURT: Yes.

MR. SCOTT: Q. What, if anything, did he point to when he motioned? Just describe the nature of his motion, will you, for the court?

A. For me to come down to the pit.

Q. Did he motion you where to come down?

MR. JACKSON: Just a minute.

A. For me to come around so he could see me so I could tell him what I wanted him to do.

MR. JACKSON: That last, if your Honor please, I move be stricken out as to what he could do.

THE COURT: That may go out as to what he could do.

MR. SCOTT: Exception.

Q. What did you do after that, Mr. James?

A. Why, in order to see him under the car I had to squat down on this runway.

MR. JACKSON: I object to that.

MR. ROBERTS: O. - - from Mr. Bailey?

A. Yes, when he came - -

MR. JACKSON: That is correct. That is correct.

MR. ROBERTS: I maintain the objection.

MR. ROBERTS: What did Mr. Bailey do or say?

A. He mentioned for me to come on this ship.

A. Did you do that? A. Yes, sir.

MR. JACKSON: I object. That is correct. I want to mention that he was not on the ship at that time.

MR. ROBERTS: Yes.

MR. JACKSON: But I will not be satisfied - -

THE COURT: SILENCE NOW.

MR. ROBERTS: All he said to me was to come on the ship.

MR. JACKSON: That is correct. This witness should be removed from the stand.

THE COURT: Yes.

MR. ROBERTS: I object. It is correct. This witness should be removed from the stand.

A. Yes, he was on the ship at that time.

A. He was on the ship at that time.

MR. JACKSON: That is correct.

A. For me to come around so he could see me I could tell him what I wanted him to do.

MR. JACKSON: That is correct. It is correct. I have no objection and he was on the ship.

MR. ROBERTS: That is correct. It is correct.

MR. ROBERTS: Exception.

A. That is what he said, Mr. Jackson.

A. Yes, in order to see him when the ship was to depart from this country.

On cross-examination, plaintiff further testified as follows:

"Q. Did you get out of your car before or after he was there?

A. I got out of the car as he was getting down. He motioned to me."

On redirect examination plaintiff's counsel interrogated the witness as to this occurrence, and he testified further as follows:

"Q. How did you happen to go out on this runway, Mr. James?

A. Why, I was beckoned to come out on the runway.

MR. SCOTT: Q. What?

A. Why, I was beckoned to come out on the runway.

MR. SCOTT: Q. What?

A. I was beckoned to come out on the runway. Motioned for me to come out on the runway.

Q. Who motioned? A. Mr. Wells.

Q. You went out there on his order; is that it?

A. That is the only way I could see him.

MR. JACKSON: I object to that and ask that be stricken.

MR. SCOTT: Q. Did he motion for you to come out on the runway?

A. Yes.

MR. SCOTT: That is all."

On re-cross-examination the following testimony was further adduced by plaintiff:

"Q. Where was he when he motioned? A. What is that?

Q. Where was he when he motioned?

A. Coming down the pit.

Q. And where were you? A. In my car.

Q. You don't know whether he motioned to you to come down in the pit or any place else, do you?

A. I was looking at him. I couldn't help but see him.

On September 11, 1941, the following was received:

Follows:

Q. Did you get out of your car before or after he was there?

A. I got out of the car as he was getting down. He got down as well.

On September 11, 1941, the following was received:

Q. Did the witness see any other persons, and he testified that he

as follows:

Q. Did the witness see any other persons, and he testified that he

A. Yes, I saw several other persons in the crowd.

Q. Did you see any other persons?

A. Yes, I saw several other persons in the crowd.

Q. Did you see any other persons?

A. I saw several other persons in the crowd. I saw them as they were going down the stairs.

Q. Did you see any other persons?

A. Yes, I saw several other persons in the crowd. I saw them as they were going down the stairs.

A. That is the only way I could see him.

Q. Did you see any other persons?

A. Yes, I saw several other persons in the crowd. I saw them as they were going down the stairs.

on the way.

A. Yes.

Q. Did you see any other persons?

A. Yes, I saw several other persons in the crowd. I saw them as they were going down the stairs.

Further shown by exhibits:

Q. Did you see any other persons?

A. Yes, I saw several other persons in the crowd. I saw them as they were going down the stairs.

Q. Did you see any other persons?

A. Yes, I saw several other persons in the crowd. I saw them as they were going down the stairs.

Q. Did you see any other persons?

A. Yes, I saw several other persons in the crowd. I saw them as they were going down the stairs.

see him.

Q. But you don't know where he was motioning for you to come, do you?

A. Certainly I do.

Q. How do you know?

A. He was motioning with his hands to come this way.

Q. He was motioning toward himself?

A. Toward himself, yes.

Q. He was going into the pit?

A. He was coming forward, like if I was looking at you. What do I say?

Q. He was motioning toward himself; is that it?

A. Yes."

Taking this evidence with every intendment most favorable to plaintiff, it appears that the latter assumed a squatting position behind Bowra's car on the runway, not because of anything that Wells had said to him, but pursuant to a motion made by Wells beckoning plaintiff to come toward him, Wells, while plaintiff was still seated in his car above the pit, into which Wells was then descending. It would seem to be a rather strained construction of plaintiff's testimony to hold that Wells had directed or invited plaintiff to assume a position on the I-beam behind Bowra's car. It appears from the evidence that Wells was already in the pit underneath the runway when plaintiff stepped out of his car, and that thereafter Wells proceeded to work on the transmission of plaintiff's car when the latter voluntarily assumed his position on the I-beam to the south of where Wells was engaged. The evidence is undisputed that while working on plaintiff's car, Wells had his back to plaintiff and did not see him. He evidently had no conversation with Wells while the latter was under plaintiff's car, for plaintiff stated that "there was no conversation between me and anyone else during the time I was squatting." In this state of the evidence,

Q. Now you don't know where he was watching for you to come, do you?

A. Definitely I do.

Q. How do you know?

A. He was watching with his hands to come this way.

Q. He was watching with his hands to come this way?

A. Towards himself, yes.

Q. He was looking into the air?

A. He was coming forward, like all I was looking at you, that do I say?

Q. He was watching toward himself; is that it?

A. Yes.

Q. Now the witness with every instrument that I have able to identify, it appears that the latter assumed a standing position behind Gault's car on the highway, not because of anything that Gault had said to him, but pursuant to a motion made by Gault beckoning Gault to come toward him, while Gault was then still seated in his car above the pit, into which Gault was then descending. It would seem to be a rather strained construction of Gault's testimony to call this into question as having been Gault's intention to assume a position on the 1-beam behind Gault's car. It appears from the evidence that Gault was already in the pit under each the time that Gault stepped out of his car, and that Gault's will proceeded to work on the assumption of Gault's car when the latter voluntarily assumed his position on the 1-beam to the south of Gault's car was engaged. The evidence is undisputed that Gault stepped on Gault's car, while he was on the 1-beam and the car was there. He obviously had no conversation with Gault while the latter was on the 1-beam, and the Gault's testimony that Gault was on the 1-beam and on the 1-beam after stated that Gault was on the 1-beam and on the 1-beam after during the time I was speaking. In this state of the evidence,

we are inclined to agree with defendant's contention that plaintiff not only failed to allege, but also failed to prove that Wells knew of the dangerous position assumed by plaintiff, which would have necessitated a warning to plaintiff that Bowra was about to operate his car on the adjacent runway.

The evidence discloses that when the mechanic engaged on Bowra's car had completed his work, he told Bowra to go ahead. Bowra then stepped into his car, looked in the mirror in the front end thereof, and seeing nobody, he proceeded to back off the runway. There is no evidence whatever, and it is not here contended, that either Bowra or the mechanic who worked on his car knew, or had any means of knowing, that plaintiff was squatting on the runway. Therefore, in the absence of any knowledge, there could have been no warning to plaintiff on the part of either Bowra or his mechanic.

It appears from this record that the danger of Bowra's car was as open, obvious and apparent to plaintiff as it could have been to the defendant. Instead of taking a safe position on the walk, which was provided for that purpose, he assumed a position more hazardous. In doing so he must have known that at some time or other Bowra's car would leave the rack upon which it was stationed, and in the exercise of due care and caution for his own safety, he should have anticipated the possibility that Bowra, obviously unable to see plaintiff squatting behind his car on the I-beam, might back onto him at any given moment. It has been held that a party has no right to knowingly expose himself to danger of an injury which he might have avoided by the use of reasonable precaution. In the absence of wilful or wanton injury on the part of the defendant, the plaintiff cannot recover in an action for personal injuries unless it appears that he was in the exercise of ordinary care for his safety. Although it is true that the question of contributory negligence is ordinarily a question of fact for the jury, yet when there is no conflict in the

we are inclined to agree with defendant's contention that plaintiff not only failed to advise, but also failed to prove that while near of the dangerous condition assumed by plaintiff, which would have necessitated a warning to plaintiff that there was about to occur his car on the adjacent runway.

The evidence disclosed that when the mechanic engaged on Horns' car had completed his work, he told Horns to go ahead. Horns then stepped into his car, looked in the mirror at the front end thereof, and seeing nobody, he proceeded to back off the runway. There is no evidence whatever, and it is not here contended, that either Horns or the mechanic who worked on his car knew, or had any means of knowing, that plaintiff was standing on the runway. Therefore, in the absence of any knowledge, there could have been no warning to plaintiff on the part of either Horns or his mechanic.

It appears from this record that the danger of Horns' car was as open, obvious and apparent to plaintiff as it could have been to the defendant. Instead of taking a safe position on the left side and waiting for the car to pass, he assumed a position near the rear of the car and waited for the car to pass. It being so he must have known that at some time or other Horns' car would leave the track upon which it was stopped, and in the exercise of due care and caution for his own safety, he should have anticipated the possibility that Horns, obviously unable to see plaintiff standing behind the car on the left, might pass him at any given moment. It has been held that a party has no right to knowingly expose himself to danger of an injury which he might have avoided by the use of reasonable precaution. In the absence of such an action injury on the part of the defendant, the plaintiff cannot recover in an action for personal injuries unless it appears that he was in the exercise of ordinary care for his safety. Although it is true that the condition of defendant's highway is not a contributory factor in this case, yet the fact that the plaintiff was standing in the rear of the car is a contributory factor in this case.

evidence and the court can clearly see that the injury was the result of contributory negligence by the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant. Illinois Central Ry. Co. v. Oswald, 338 Ill. 270, and cases cited therein.

Defendants urge the further point that plaintiff had sufficient time to step the short distance of approximately 3 feet that separated him from the ground leading to the runway, after he observed Bowra's car backing toward him, and that his failure to so do constituted further contributory negligence. In view of our conclusion, however, as to the main contention, we consider it unnecessary to discuss this assignment of error.

We are of the opinion that plaintiff failed to allege and prove a cause of action against the defendants, Wells. There is no evidence in the record that Bowra at any time before the accident saw plaintiff, or that he or the mechanic working on his car knew of plaintiff's position behind Bowra's car, and therefore no liability is shown as to Bowra. For the reasons stated, the judgment, which was rendered jointly as to all the defendants, will be reversed with findings of fact here.

REVERSED WITH FINDINGS OF FACT.

NEBEL, P.J. AND WILSON, J. CONCUR.

FINDINGS OF FACT: We find as matter of fact that no liability is shown by the evidence as to the defendant Bowra; that the declaration does not allege and the evidence fails to prove that the defendants Wells had knowledge that plaintiff was in a dangerous position and therefore there could be no duty on their part to warn him; that the danger inherent to the position assumed by plaintiff was as open, obvious and apparent to plaintiff as it could have been to defendants, Wells, and that in assuming such position, plaintiff was not in the exercise of ordinary care for his own safety.

evidence and the court can clearly see that the injury was the result of contributory negligence by the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant. Illinois Central Ry. Co. v. Gamble, 338 Ill. 270, and cases often therein.

Defendants urge the further point that plaintiff had sufficient time to stop the short distance of approximately 2 feet that separated him from the ground leading to the runway, after he observed the car and the engine approaching. But this claim is an admitted fact of contributory negligence. In view of our holding, however, as to the main contention, we consider it unnecessary to discuss this contention at length.

We are of the opinion that plaintiff failed to stop and prove a case of action against the defendant, this. There is no evidence in the record that shows at any time before the collision that plaintiff, or that he or the machine working on his car knew of plaintiff's position facing the car, and therefore no liability is shown as to them. For the reasons stated, the judgment, which was rendered jointly as to all the defendants, will be reversed with findings of fact here.

REVEREND WITH FINDINGS OF FACT.
JULY 1, 1933. THE COURT, BY THE COURT.
FINDINGS OF FACT: The fact as stated in this brief by plaintiff is shown by the evidence as to the defendant's fault; that the defendant does not allege and the evidence fails to show that the defendant with his knowledge that plaintiff was in a dangerous position and therefore could be so kept on their feet by some light and the light incident to the collision caused by plaintiff was as shown. Plaintiff was negligent in plaintiff as it would have been in defendant, and that in defendant's negligence, plaintiff was not in the exercise of ordinary care for his safety.

35151

FRED J. JAMES,

Appellee,

v.

FRED BOWRA, et al,

Appellants.

ON APPEAL OF FRED BOWRA.

64
APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

264 I.A. 629²

Opinion filed Jan. 20, 1932

MR. JUSTICE FRIEND delivered the opinion of the court.

This case was consolidated with No. 35067. The facts are the same in both cases, and the conclusions reached in opinion No. 35067 are applicable to this proceeding. The judgment of the Superior Court will be reversed with findings of fact here.

REVERSED WITH FINDINGS OF FACT.

HEBEL, P.J. AND WILSON, J. CONCUR.

FINDINGS OF FACT: We find as a matter of fact that the evidence shows no negligence whatever on the part of the defendant Bowra as alleged in plaintiff's declaration.

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Opinion filed Jan. 30, 1933

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35133

REGINA RUBENSTEIN,

(Complainant) Appellee,

v.

WILLIAM DAVID RUBENSTEIN,

(Defendant) Appellant.

65
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

264 I.A. 629³

Opinion filed Jan. 20, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from certain portions of a decree for divorce in favor of Regina Rubenstein against the defendant William David Rubenstein. That part of the decree from which the appeal was prayed was the part allowing solicitor's fees, master's fees and costs against the defendant. No appeal was taken from that part of the decree charging the defendant with the costs of the stenographer's fees and necessarily that question is not before us.

Counsel for the defendant insists that the evidence must be preserved by a certificate of evidence, or there must be a finding of fact in the decree sufficient to support the decree itself. We agree with counsel in this statement of the rule. The praecipe for record and the additional praecipe for record, however, are limited. We have not before us, therefore, a complete record and have no means of knowing otherwise, than stated in the brief of appellant, the fact that there was no certificate of evidence filed in the cause. We are of the opinion, however, that the decree itself contains sufficient facts to support the decree. It is voluminous and extensive and contains a recital of all the ultimate facts necessary to a decision.

The decree finds that the complainant and her minor child are in destitute circumstances and that the defendant is able to support and maintain them; that it became necessary for the

SECRET (continued)

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CSG 41485

Opinion filed Jan. 30, 1938

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complainant to engage a solicitor to represent her and to expend moneys for the cost of suit, subpoenaing witnesses, and for master's fees. It contains recitals to the effect that the complainant employed a solicitor to represent her and that the solicitor performed services in and about the preparation and trial of the cause, as testified to in open court; that the solicitor was an attorney at law and a solicitor of long practice in the City of Chicago and that the services rendered were necessary, and that the fair and reasonable value of the services was of a certain amount.

The master's report, which appears in the record and was ordered by the praecipe to the clerk, and found in the record, goes fully into the facts as to the financial responsibility of the defendant and his ability to earn money, together with his various business transactions. The complete record not being before us, we assume that the master's report was filed and approved. The fact that it was filed is apparent because of the fact that it appears in the record under the praecipe order. We assume that it was before the court and considered at the time the court fixed the solicitor's fees and the costs. Even though it were not, the court's decree specifically states that the court heard evidence and it was only necessary for the court to find the ultimate facts in its final decree.

The Supreme Court of this state in the case of Szarowicz v. Szarowicz, 338 Ill. 481 says:

"The decree is lengthy and we have set out what we deem the most important parts of it because no certificate of evidence is embraced in the record, and the principal contention of defendant here is that there must be a certificate of evidence or the decree must contain findings of fact justifying the conclusion reached by the chancellor. There is no doubt of the correctness of that position, but the decree in this case contains findings of fact which support it. We deem it unnecessary to take the time to demonstrate this by referring to the findings of the decree which we have substantially set out in the former part of this opinion.

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Approved: _____

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We think the position of defendant is not sustained in alleging that the decree does not recite sufficient facts to sustain it. It is not necessary that the decree should set out the evidence where the case is heard in open court on oral and documentary testimony. (Moore v. School Trustee, 19 Ill. 83.) The recital of the ultimate facts is sufficient to sustain the decree. (French v. French, 308 Ill. 152; Rybakowicz v. Rybakowicz, 390 id. 550; Cooley v. Scarlett, 38 id. 316; Ward v. O'eng, 18 id. 283.) We think the decree in this case is not subject to the attack made by defendant that it does not contain sufficient recitals to sustain it."

The decree being sufficient and containing a finding of the ultimate facts, it is not necessary to have preserved the evidence itself by a certificate of evidence. In addition, as suggested before, the cause being heard on part of the record only, we may indulge in the presumption that a certificate of evidence was filed.

For the reasons stated in this opinion the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

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35237

THOMAS H. McNEILL, HENRY H. McNEILL
AND NANNIE E. McNEILL, Trustees
under the Last Will and Testament
of Thomas H. McNeill, deceased,
MALCOLM R. McNEILL, CHERRILL McNEILL
ADAMS, DOROTHY McNEILL WOOD, ELLEN
C. ROBERS and THOMAS H. CRUDUP,
doing business under the name, style
and description of McNEILL BROS.,

Appellees,

v.

STEIN TEXTILE CO., a corporation,

Appellant.

66
APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

264 I.A. 629⁴

Opinion filed Jan. 20, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiffs obtained judgment by confession on a lease dated December 8, 1928, against the defendant, Stein Textile Co., a corporation. The lease in question expired December 31, 1929, and the judgment was for rent for the months of July and August, 1929, amounting to \$800, plus attorney's fees of \$20. August 16, 1929, the defendant entered its motion to vacate and set aside the judgment and, in support of its motion, it filed certain affidavits setting forth the defense as claimed. The judgment was opened up and leave given to plead, the judgment to stand as security. The issues were tried by a jury, resulting in a verdict in favor of the plaintiffs, upon which verdict judgment was entered in the sum of \$820. After the entry of said judgment the defendant paid the sum of \$400 and this amount was credited on the judgment. From this judgment, as amended by allowing the credit, an appeal was prayed and allowed to this court.

Plaintiffs called as a witness one Thomas H. McNeill, who testified that he was the manager of the McNeill Building at 323-25 West Jackson Boulevard and identified the lease marked,

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AND SHERIFF OF MARICOPA COUNTY, ARIZONA
WHEREAS THE LAST WILL AND TESTAMENT
OF THOMAS A. MARICOPA, DECEASED,
WAS FILED FOR RECORD IN THE
OFFICE OF THE COUNTY CLERK OF
MARICOPA COUNTY, ARIZONA, ON
JANUARY 10, 1933, AND THE
SAYED WILL BEING PROVEN AND
APPROVED BY THE COURT, THE
SAYED WILL WAS RECORDED IN THE
OFFICE OF THE COUNTY CLERK OF
MARICOPA COUNTY, ARIZONA, ON
JANUARY 10, 1933.

TESTED:

THIS BEING A TRUE AND CORRECT
TRANSLATION OF THE ORIGINAL

TESTED:

Opinion filed Jan. 20, 1933

THE COURT HEREBY CERTIFIES THAT THE
FOLLOWING IS A TRUE AND CORRECT
TRANSLATION OF THE ORIGINAL
SAYED WILL, AS FILED FOR RECORD
IN THE OFFICE OF THE COUNTY CLERK
OF MARICOPA COUNTY, ARIZONA, ON
JANUARY 10, 1933, AND THE
SAYED WILL BEING PROVEN AND
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THIS BEING A TRUE AND CORRECT
TRANSLATION OF THE ORIGINAL
SAYED WILL, AS FILED FOR RECORD
IN THE OFFICE OF THE COUNTY CLERK
OF MARICOPA COUNTY, ARIZONA, ON
JANUARY 10, 1933, AND THE
SAYED WILL BEING PROVEN AND
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JANUARY 10, 1933.

"Plaintiffs' Exhibit 1", as the lease signed by the defendant to the premises in question. The witness further testified that no rent had been paid for the months of July and August and that said rent amounted to \$800 and that the attorney's fee was \$20; that subsequent to the obtaining of the judgment by confession \$400 had been paid and applied on the rent; that he had been offered a check for the July rent prior to the entry of the judgment by confession, but that it had been refused, as it bore the notation, "This is in full payment for store at 317 W. Jackson Boulevard."

Dorothy Goldstein testified that she was secretary and treasurer of Stein Textile Company and that in April, 1938, she heard a conversation between McNeill and her father and her brother; that McNeill told them he had a man who wanted to pay \$550 in rent, but that he would give the Steins the preference and let them have it for \$500, and that if they did not want to pay the \$500 he would release them and they could move out; that when they moved out they tendered McNeill a check for the July rent, together with the keys to the premises; that they later received a letter returning the check.

Issac Stein testified that in a conversation with McNeill he, McNeill, told the witness and his son and daughter, that he had a chance to get \$550 for the store and that he wanted the defendant to know, so that if they did not wish to sign a new lease they could look for another place.

A witness named Hirsch testified that he talked with McNeill and was told by him that he could not rent the store for immediate possession and not until January 1st, which was too late for the witness's purpose. The witness further testified on cross-examination that he had seen a sign put out by the Steins to the effect that the premises were for rent; that he was not related to the Steins, but had business relations with them for a period of four years.

"Alibi," Exhibit 1, as the issue signed by the defendant in the presence is question. The witness further testified that no rent had been paid for the month of July and August and that the rent amounted to \$400 and that the attorney's fee was \$200; that subsequent to the obtaining of the judgment by confession (as) had been paid and applied on the rent; that he had been offered a check for the July rent prior to the entry of the judgment by confession, but that it had been returned as it bore the notation, "This is in full payment for rent of July, August and September."

Herbert H. H. testified that the defendant, who is a resident of State of California, and that in April, 1933, she heard a conversation between Howell and her father and her brother; that Howell told them he had a man who wanted to pay \$400 in rent, but that he would give the State the preference and let them have it for \$200, and that if they did not want to pay the \$200 he would release them and they could move out; that when they moved out they tendered Howell a check for the July rent, together with the keys to the premises; that they later received a letter regarding the check.

James Brown testified that in a conversation with Howell he, Howell, told the witness and his son, Ed Brown, that he had a chance to get \$400 for the store and that he wanted the defendant to come, as well as if they did not wish to sign a new lease.

A witness named Brown testified that he talked with Howell and was told by him that he could not rent the store for immediate possession and not until January 1st, which was the date for the witness's response. The witness further testified as to examination that he had seen a sign put out by the owner to the effect that the premises were for rent; that he was not related to the owner, but had business relations with them for a period of four years.

McNeill, recalled as a witness for plaintiffs,

testified that Stein's lease expired on the following January and that he talked with him with reference to renewing it; that he never told Stein he could move out; that the entire conversation was with reference to the renewal of the lease at the expiration of the then existing lease and that while he told Stein that he had other people who were interested in the store, he preferred to keep his old tenants and would give Stein the first chance of renewing the lease. The witness denied that anything was said about immediate possession and nothing was said about his having a tenant who wanted such possession.

Defendant contends that there was a parol agreement between itself and the plaintiffs for the surrender of the premises and a cancellation of the lease and that, pursuant to such agreement, it moved out and vacated the premises. This was a question of fact to be submitted to the jury. The rule in this regard is found in the case of Alschuler v. Schiff, 164 Ill. 298. The court in its opinion, said:

"There can no longer be any contention in this State over the general rule insisted upon by appellee, that a sealed executory contract cannot be altered, changed or modified by parol agreement. This rule of the common law has been adopted by this court and consistently followed in a long line of unbroken authorities. (Chapman v. McGraw, 20 Ill. 101; Mum Bros. v. Taylor, 63 id. 43; Barnett v. Barnes, 73 id. 216; Loach v. Farnum, 90 id. 368; Goldsborough v. Goble, 140 id. 269.) * * *

We hold it to be the law of this State, that where it is not sought to alter or change the terms of a contract under seal, still leaving it in force, but where the object is to show that such instrument has been abrogated, canceled and surrendered, the question is one of fact for a jury, and evidence thereon is admissible."

There is no question of estoppel in the case, as claimed by defendant, because the proposition that the plaintiffs stood by and saw something done and made no objection, was also a question of fact which was decided by the verdict of the jury.

The proposition advanced by defendant that it was the duty of the plaintiffs to mitigate the damages by using due diligence to re-let the premises, is untenable. In the first place, the action on the lease is for the months of July and August. The defendant did not vacate the premises until about the middle of July. The obligation of the defendant to pay rent for this month is evidenced by the fact that it did pay said rent amounting to \$400, which was credited on the judgment. The affidavit of Jacob Stein, president of the defendant corporation, stated that the premises were vacated July 31, 1929. There did not remain much time for the plaintiffs to obtain a tenant.

The jury had an opportunity of hearing the testimony of Hirsch that ^{had} he/made inquiries with regard to leasing the premises and did not appear to give that testimony much weight.

The lease contains a provision: "That in case the Lessees vacate said premises during the term hereby created, the Lessor shall have the option, without terminating this lease, to enter said premises and re-let the same for the account of the Lessees." Under this clause the lessor had the right, if desired, to let the premises for the benefit of the lessees, - otherwise to permit them to remain vacant and hold the lessee responsible for the term. In the event the lessor entered and re-let, it does not release the tenant from his obligation. A provision similar to the one in the lease involved in this case is found in Harmon v. Callahan, 214 Ill. App. 104. The court in its opinion in that case, said:

"It would seem to be the law that where a lease is made, and subsequently the premises are abandoned by the tenant, and following that there is merely a re-entry by the landlord, the original contract still stands and the tenant is liable on his promise to pay rent; that mere abandonment and re-entry do not cancel the lease; and, further, that, under such circumstances, the mere abandonment of the premises by the tenant and re-entry by the landlord does not give rise to an obligation on the landlord to endeavor to re-rent."

The proposition advanced by defendant that it was the duty of the plaintiff to mitigate the damages by leasing the premises to the plaintiff is not correct. In the first place, the plaintiff on the lease is for the purpose of buying and selling. The defendant did not vacate the premises until about the middle of July. The obligation of the defendant as far as this matter is concerned by the fact that it did pay said rent amounting to \$1000, which was credited on the judgment. The plaintiff at that time, defendant of the defendant corporation, stated that the premises were vacated July 31, 1933. There was no more time for the plaintiff to vacate a house.

The jury had an opportunity of hearing the testimony of witness that the premises were vacated with regard to the premises and did not appear to give that testimony much weight. The lease contained a provision that "That in case the lessor vacates said premises during the term hereby created, the lessee shall have the option, without terminating this lease, to enter said premises and vacate the same for the amount of the lease." Under this clause the lessor had the right, it seemed, to let the premises for the benefit of the lessee, - otherwise to permit them to remain vacant and hold the lessee responsible for the loss. In the event the lessor vacates the premises, it seems that the lessee should have the option to let the premises for the same in the same manner as the lessee. A provision similar to the one in the lease is found in the lease to William J. Williams, the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th, 101st, 102nd, 103rd, 104th, 105th, 106th, 107th, 108th, 109th, 110th, 111th, 112th, 113th, 114th, 115th, 116th, 117th, 118th, 119th, 120th, 121st, 122nd, 123rd, 124th, 125th, 126th, 127th, 128th, 129th, 130th, 131st, 132nd, 133rd, 134th, 135th, 136th, 137th, 138th, 139th, 140th, 141st, 142nd, 143rd, 144th, 145th, 146th, 147th, 148th, 149th, 150th, 151st, 152nd, 153rd, 154th, 155th, 156th, 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To the same effect see Hirsch v. Home Appliances, Inc., 243 Ill. App. 418; United Cigar Stores Co. v. Friend, 257 Ill. App. 359.

We see no reversible error in the giving of the instructions on behalf of the plaintiffs.

At the request of the defendant the court instructed the jury that if the plaintiffs requested the defendant to vacate and turn over the possession of the premises described in the lease, so as to permit the plaintiffs to rent said premises to another tenant and that the plaintiffs agreed with the defendant in consideration of such removal plaintiffs would release the defendant from all further liability, then their verdict should be for the defendant. This was the defense relied upon by the defendant, and the jury was instructed to the effect that if they so found they should find the issues against the plaintiffs. By their verdict the jury found otherwise. The verdict of the jury reads as follows: "We the Jury find the issues for the plaintiffs and assess the Plaintiffs' damages at the sum of _____ Dollars."

It is urged as a ground for reversal that this verdict was a nullity. We can not agree with this view. This court looks to the substance rather than to the form. The judgment from which the appeal was taken was complete; the damages were liquidated and certain. If the jury found the issues for the plaintiffs, the damages assessable were \$820, which constituted two months' rent plus the attorney's fee. The original judgment, however, in the case was still in full force and effect and, by their verdict, the jury found the issues in favor of the plaintiffs and in that regard sustained the original judgment. Northeastern Coal Company v. Tyrrell, 133 Ill. App. 472; Hall, et al. v. First Nat. Bank of Emporia, 133 Ill. 234; Morris et al v. Taylor, 199 Ill. App. 588; Wenham v. International Packing Co., 213 Ill. 397.

Plaintiffs in the first instance placed a witness upon the stand to prove the lease and the non-payment of rent; defendant followed with its proof and plaintiffs introduced evidence in rebuttal. Counsel for defendant insists that defendant had the right to open and close the argument. This contention might have had some weight if the defendant in the first instance had admitted the genuineness of the lease or non-payment of the rent and proceeded to introduce his evidence. The burden was upon the plaintiffs, however, and we see no reversible error in the order of the court, granting plaintiffs the right to open and close the argument. Carpenter v. First National Bank, 19 Ill. App. 549.

We cannot say that any injustice has been done nor are we of the opinion that the trial court abused its discretion in directing the plaintiffs to open and close the argument. The questions of fact involved in the case were decided by a jury and this verdict acquiesced in by the trial court in entering its judgment on said verdict. That court had an opportunity to see and hear the witnesses and to consider their relationship, each to the other, and the various circumstances in the case.

We see no reason for disturbing the judgment and, for the reasons expressed in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

plaintiff in the first instance placed a witness

upon the stand to prove the issue and the non-payment of rent;

defendant followed with its proof and plaintiff introduced evidence

in rebuttal. Counsel for defendant insists that defendant had the

right to open and close the argument. This contention might have

and was waived by the defendant in the first instance and admitted

the payment of the issue of non-payment of the rent and was

to introduce its evidence. The matter was then argued by plaintiff,

and we see no reversible error in the order of the court, granting

plaintiff the right to open and close the argument. REVEREND v.

First National Bank, 13 Ill. App. 303.

we cannot say that any injustice has been done any

way to it the matter that will have its effect in

directing the plaintiff to open and close the argument. The

questions at that involved in the case were settled by the

this verdict notwithstanding by the trial court in entering the judg-

ment of said verdict. That court had an opportunity to see and hear

the witnesses and to consider their testimony, each to the other,

and the various circumstances in the case.

So we see no reason for disturbing the judgment.

For the reasons expressed in this opinion, the judgment of the

trial court is affirmed.

APPROVED BY THE COURT.

REVEREND, J. CLERK, J. CLERK.

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35262

SIDNEY LYON,

(Plaintiff) Appellee,

v.

AMERICAN ACCEPTANCE CORPORATION,
a Corporation,

(Defendant) Appellant.

67
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 630

Opinion filed Jan. 20, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

This was an action brought by the plaintiff Sidney Lyon against the American Acceptance Corporation, defendant, to recover for legal services performed at the request of the defendant. The cause was tried before a jury, resulting in a verdict in favor of the plaintiff for \$427.50, and judgment was entered upon the verdict. An appeal was taken from the judgment to this court.

Plaintiff testified that he was a practicing lawyer in the City of Chicago and that he received a communication from the defendant corporation asking him to look after certain tax matters and that he talked with a Mr. Livingston, vice-president of the defendant company, and agreed with him to take care of what was known as the capital stock assessment of the defendant corporation for an amount equal to 25 per cent of the amount of the tax. Plaintiff introduced in evidence a communication dated November 7, 1928, enclosing a notice from the Tax Commission, addressed to himself. Plaintiff appeared before the Tax Commission at Springfield and succeeded in having the tax cancelled.

Livingston, testifying on behalf of defendant, stated that there was no such agreement and, on the other hand, Lyon had

3032

STREET LIGHT

(SPECIALTY) COMPANY

AMERICAN ASSOCIATION OF CORPORATE

(SPECIALTY) COMPANY

ARTIST ROOM

STREET LIGHT

OF CHURCH

264 I.A. 680

Opinion filed Jan. 20, 1932

MR. JUSTICE WILSON delivered the opinion of the court.
 This was an action brought by the plaintiff against
 upon against the American Association of Corporate
 recovery for legal services rendered at the request of the defendant.
 The case was tried before a jury, resulting in a verdict in favor
 of the plaintiff for \$437.50, and judgment was entered upon the
 verdict. An appeal was taken from the judgment to this court.
 The plaintiff testified that he was a practicing lawyer in
 the city of Chicago and that he received a communication from the
 defendant requesting him to look after certain tax matters
 and that he advised the defendant, vice-president of the
 defendant company, and advised him to take care of the tax
 on the basis of the statement of the defendant's corporation for an
 amount equal to 25 per cent of the amount of the tax. Plaintiff
 introduced in evidence a communication dated December 7, 1929, ad-
 vancing a motion for the tax commission, returned as follows:
 Plaintiff appeared before the Tax Commission at Washington and
 succeeded in having the tax cancelled.
 Plaintiff, testifying on behalf of defendant, stated
 that there was an oral agreement made on the 11th day of June 1929

taken care of the taxes for the previous year with the understanding that there was to be no further tax against the corporation upon its capital stock. Livingston further stated that Lyon was paid at that time \$350 and that the capital stock of the corporation in the year 1927 was \$1,000,000, and that this was subsequently reduced to \$250,000 in 1928, so that the tax would have been proportionately lower. The services rendered were for the year 1928.

One Charles Kressmann, called as a witness on behalf of plaintiff, stated that he was connected with the State Tax Commission in 1928 and the records show that the capital stock of the corporation was still \$1,000,000 and the assessment was \$30,000.

It appears from the testimony of plaintiff that the amount collectible would have been \$1,710.00 and that 25 per cent of this was \$427.50, which was the amount of the verdict.

The entire question was one of fact for the jury and the trial court.

Plaintiff denied that under his agreement for obtaining the cancellation of the 1927 taxes that there was an understanding that there was to be no further taxation on the capital stock of the defendant.

Grossberg, a witness called on behalf of plaintiff, testified that he was a practicing lawyer and, in answer to a hypothetical question, stated that in his opinion between \$500 and \$600 would be a fair value for the services.

It is urged as a ground for reversal that there was error in permitting the witness Grossberg to testify as to the fair and reasonable value of the services over the objection of the defendant. It is claimed that the question should have been what was the ordinary and customary value of the services. The

One Charles Frederick, called by a witness as "Bill", testified that he was connected with the State Tax Commission in 1938 and the records show that the Capital stock of the corporation was still \$100,000 and the statement was \$10,000. It appears from the testimony of Plaintiff that the amount collected would have been \$1,750.00 and that he was sent of this was \$407.50, which was the amount of the verdict. The entire question was one of fact for the jury and the trial court.

that there was to be no further taxation on the capital stock of the company.

...and a fair value for the services.

It is urged as a ground for removal that there was error in permitting the witness to testify as to the fair and reasonable value of the services over the objection of the defendant. It is claimed that the question should have been left to the jury. The court holds that the testimony of the witness was not competent evidence of the value of the services. The court holds that the testimony of the witness was not competent evidence of the value of the services. The court holds that the testimony of the witness was not competent evidence of the value of the services.

court, however, asked counsel to point out his reasons for the objection to the question, and this was not given as one of the grounds upon which the objection was based. The action itself, however, was based upon a definite, specific contract and did not require evidence as to the value of the services performed. There is no force in the proposition that the verdict is excessive inasmuch as plaintiff's case is based upon a definite, specific agreement.

The verdict of the jury and the judgment of the trial court thereon is binding upon this court as to the facts unless this court is able to say that the judgment is manifestly against the weight of the evidence. We are unable to come to such a conclusion and are of the opinion that the judgment should be affirmed.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

count, however, asked counsel to point out his reasons for the objection to the opinion, and this was not done as far as the grounds were going the objection was based. The court itself, however, was based upon a belief, without comment and did not require evidence as to the value of the services rendered. There is no force in the submission that the verdict is excessive because as plaintiff's case is based upon a belief, therefore, the verdict of the jury and the judgment of the trial court should be standing upon this case as to the facts. While this court is able to say that the judgment is manifestly against the weight of the evidence, we are unable to come to such a conclusion and yet it is within that the judgment should be affirmed.

of the National Council on Education

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35285

W. L. KNEBEL,

Appellant,

v.

OLIVER P. BARTLETT,

Appellee.

68
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 630²

Opinion filed Jan. 20, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from an order entered on April 6, 1931, vacating a judgment in favor of the plaintiff and setting aside a verdict of the jury in favor of the plaintiff, upon a motion in the form of a writ of error coram nobis. The defendant was not present at the time of the trial and the motion to set aside the judgment was made and entered more than thirty days after the rendition of the judgment. From the record, the petition filed in support of the motion, and affidavits filed on both sides, it appears that the statement of claim was filed January 15, 1929, and that on January 23, of that year the appearance of the defendant was entered by his counsel and demand made for a jury trial. An affidavit of merits was filed February 15, 1929, and on February 24, 1930, an order was entered dismissing the cause for want of prosecution. On February 27, 1930, an order was entered vacating the order of dismissal under a stipulation entered into between the attorneys for the plaintiff and the defendant. The stipulation reads as follows:

"It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the above entitled case having been dismissed by error that said case be reset and placed upon the short cause calendar for trial."

The court vacated the order of dismissal, but did

not place the cause upon the short cause calendar, and instead ordered it returned to its regular place on the calendar. The order of the court as it appears, is as follows:

"By stip. dis'l of Feb. 24, 1930 vac. and set aside and ord. ct. case stricken from short cause cal. and ord. ret. to regular place on cal."

No question is raised as to the form or meaning of this order.

The case evidently went to the foot of the docket as it appears upon the Municipal Court jury calendar issued and printed in May 1930, which was made up after the order striking it from the short cause calendar and ordering it returned to its regular place on the calendar. December 8, 1930, upon a call of the calendar, the cause was set for trial on January 8, 1931. On that day it was continued to January 9, 1931 and again to January 19 and again to January 20, at which time the cause was tried ex parte and a verdict rendered and judgment entered against the defendant. Neither the defendant nor his attorney appeared on December 8, 1930, nor on any of the dates following.

March 26, 1931, defendant filed his motion to vacate said judgment and verdict. The petition filed states defendant has a good and meritorious defense, but does not set out any facts except the statute of limitations. It is defendant's contention that the court order striking the case from the short cause calendar and ordering it returned to the regular jury calendar should be construed as requiring the clerk to place it on said jury calendar after the defendant had been notified in accordance with section 31 of the Practice act and that the failure of the clerk so to do constituted an error of fact requiring the trial court under section 33 of the Practice Act to set aside the ex parte judgment.

Section 31 of the Practice Act provides as follows:

"If a suit which is upon the regular calendar shall be placed upon the 'Short Cause Calendar,' it shall be stricken off the regular trial calendar and shall not

again be placed thereon, except upon notice to all the other parties to the suit, his, or their agent or attorney."

There is nothing in the record from which it can be inferred that other than the regular practice was followed and that when the cause was placed upon the short cause calendar it was stricken off the regular trial calendar. It still remained upon the docket, however, and the docket should not be confused with the trial calendar. It does not appear that the cause was placed upon the regular jury calendar, then being heard, but did appear upon a subsequent calendar printed after the order striking it from the short cause calendar.

Section 29 of the Practice Act provides that in the event such a cause is taken off the short cause calendar it shall, unless ordered by the court, go to the foot of the docket. In the event it was placed at the foot of the docket it would necessarily appear upon the next regular printed calendar in its order.

While the order under consideration in this cause was to the effect that it was to be returned to its regular place on the calendar, never-the-less, as a matter of fact, it was redocketed and appeared upon the next regular trial calendar. This court in the case of Rosenthal v. Wald, 252 Ill. App. 393, said:

"In striking the case from the short cause calendar the court had power to make such direction as it might see fit. We find no rule of the municipal court regulating the disposition of short cause calendar cases when they are stricken from that calendar. In the light of these facts, we must construe the order as a direction to the clerk to place the cause on the next jury calendar, succeeding the February, 1927, jury calendar. In ordinary procedure such would have been the course the cause would have taken."

This appears to have been the course which the case under advisement followed.

Section 31 provides that when a cause is stricken off the regular trial calendar and placed upon the short cause calendar, it shall not be returned to its place upon the regular trial calendar

without notice. In our opinion this does not cover the present situation, inasmuch as the cause was not returned to the regular calendar, but reentered and appeared in its regular order on the next printed regular trial calendar.

It is insisted by counsel for plaintiff that, by the stipulation entered into, counsel was presumed to be in court and have knowledge of what took place. This court in the case of Baldwin v. Economy Furniture Co., 70 Ill. App. 48, in its opinion says:

"Any writing filed in the papers in the cause by the appellee, not going to the jurisdiction of the court in the cause which asks or consents to action by the court in the cause, must be treated as a sufficient appearance by him for all purposes."

The facts involved in that case centered around a stipulation reinstating a cause and placing it for trial. It may well be argued that by stipulating to have the cause reinstated, it became the duty of the defendant, by his counsel, to know what that order entered was pursuant to that stipulation. There is considerable force in the argument that, by entering into the stipulation, counsel waived any notice of what took place in the court pursuant thereto.. It is not necessary, however, to pass upon this question because it is admitted by the affidavit of Bernstein, counsel for the defendant, that he was notified on January 9, 1931, that the cause had been reached for trial and continued one week and that he appeared on January 16th in Room 1121 and could not find the case on the call and was unable to locate it. The affiant Bernstein, counsel for defendant, stated that he went to the clerk's office and that the file was missing. Goldberg, attorney for the plaintiff, in his affidavit filed in this cause states that the cause was called for trial December 8, and then set for trial on January 8, 1931, and that he called counsel for defendant and informed him of that fact. It appears from the record that the cause was continued thereafter on three different occasions.

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It is our opinion that defendant, by his counsel, had actual knowledge of the fact that the cause was called for trial and that, even though no written notice was served upon defendant of the fact that the cause was upon the regular trial call, nevertheless, defendant, by his counsel, had actual notice of that fact. The cause was reinstated February 27, 1931, and was not reached for trial on the calendar until nearly a year thereafter. During this period of time defendant and his counsel apparently made no effort to ascertain the condition of the case. Even after having been notified of the fact that it was upon the trial calendar, apparently only a perfunctory effort was made to ascertain the real facts about the situation. Even though the files were in the office of the clerk, information could have been had from the docket or by calling counsel for plaintiff by telephone or by an examination of the trial calendar.

This court in the case of Chicago Water Purifying Co. v. Palmer Floor Company, Gen. No. 34801, (not yet reported) in its opinion, said:

"It thus appears from defendant's own petition that its counsel lacked diligence in following the case and ascertaining for himself, as it was his duty to do, whether the continuance alleged by him to have been agreed to, was procured by plaintiff's attorneys as stipulated. The petition discloses that several months intervened between July 18th, the date alleged to have been agreed upon between counsel, and October 8th, when the cause was heard. There are no specific charges that plaintiff's attorneys had anything to do with the 'disappearance' of the files in the proceeding. If it be true that the files could not be found, defendant's attorney could have ascertained the status of the case by calling plaintiff's attorneys, or consulting the court's docket or the clerk's minutes, and his failure to ascertain the facts from any of these sources indicates a clear lack of diligence. Section 88 of the Practice Act was not intended to correct errors of fact predicated on allegations such as these."

There does not appear to be any misprision of the clerk involved in the present proceeding, nor does there appear to be any fact of which the court did not have knowledge which would warrant the granting of the prayer of the petition. The order

entered by the clerk was the order of the court and conformed in all respects to that order. The position taken by defendant, viz., that the order striking the cause from the short cause calendar and ordering it returned to the regular calendar should be construed as requiring the clerk to see that the defendant had been notified of that fact, is untenable. There was no obligation on the part of the clerk to see that notice was served and there was no obligation upon the court to require notice. Moreover, the cause was not stricken from the short cause calendar, but had been dismissed for want of prosecution and was, therefore, no longer upon any calendar. When the parties by stipulation agreed to have it reinstated, the court had full power and authority to order it placed for trial upon the regular trial calendar, meaning thereby the next regular trial calendar which followed in the regular course.

For the reasons stated in this opinion the order of the Municipal Court is reversed and the cause is remanded with directions to expunge the order vacating the judgment and to take such other steps as may be necessary in the cause in conformity with the views expressed in this opinion.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

HEBEL, P.J. AND FRIEND, J. CONCUR.

entered by the clerk was the order of the court and contained no allusion
respect to this order. The position taken by defendant, viz., that
the order relating to the return of the writ should be considered as
being it returned to the regular calendar should be considered as
regarding the clerk to say that the defendant had been notified of
this fact, is untenable. There was no obligation on the part of the
clerk to do that notice was served and there was no obligation
upon the court to notify notice. Moreover, the order was not
issued from the first term calendar, but was taken forward from
that of the previous term and was, therefore, no longer upon the calendar
when the writ of habeas corpus was issued. It is not, therefore, the
order and call upon the clerk to say it placed the order upon
the regular trial calendar, meaning thereby the next regular trial
calendar which followed in the regular course.

For the reasons stated in this opinion the order of
the Municipal Court is reversed and the cause is remanded with
directions to expunge the order reciting the judgment and to take
such other steps as may be necessary in the case in conformity with
the state expressed in this opinion.

ORDER REVERSED AND CAUSE
REMANDED.

SMITH, J. C. and BROWN, J. JUDGES.

35294

PETER BRANSON and PETRONELA
BRANSON,

Defendants in Error,

v.

AUGUST POCIUS and ANELE POCIUS,

Plaintiffs in Error.

69
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

264 I.A. 630³

Opinion filed Jan. 20, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

October 4, 1927, plaintiffs filed their statement of claim alleging that the defendants were indebted to plaintiffs in the sum of \$2,300.00 for goods sold, conveyed and title warranted to the plaintiffs. February 18, 1929, nearly a year and a half later, defendants filed their last amended affidavit of merits. June 5, 1929, the cause was reached for trial in its regular order, a jury sworn to try the issues and a verdict was returned in favor of the plaintiffs in the sum of \$2,250.00 and judgment entered on the verdict. May 14, 1931, almost two years after the judgment, a praecipe for record was filed by the defendants and a writ of error sued out in this court asking for a reversal of the judgment. There is no bill of exceptions in the record and, consequently, we are not concerned with the testimony, its weight or sufficiency.

Defendants contend that the cause should be reversed for the following reasons:

(a) Because the contract alleged was one between the plaintiffs and the defendant August Pocius alone and, therefore, the statement of claim can not support a judgment against both defendants:

(b) That the mere signing of the name of Anele Pocius at the bottom of the contract does not make her a party to the contract and no judgment can stand against her; and

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1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

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is no bill of exceptions in the record and, consequently, we are not concerned with the testimony, its weight or sufficiency.

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The statement of claim can not amount to a judgment against both the plaintiffs and the defendant without being alone and therefore,

Journal of Management Education

(b) That the mere signing of the name of Louis Veuillot at the bottom of the document does not make him a party to the same.

(c) That the verdict and judgment do not conform to the pleadings and are inconsistent with the statement of claim.

The statement of claim charges that on or about the 27th day of June, 1927, in consideration of the sum of \$2,300.00, the defendants conveyed and warranted to the plaintiffs certain goods, chattels and property, (setting out the items in detail), which conveyance was made by a bill of sale, a copy of which is attached to and made a part of the statement of claim. It further charges that the defendants covenanted and agreed that the property was free and clear of incumbrance and vouched themselves as the true owners with authority to sell and dispose of the same; charges that the defendants did not have lawful authority to dispose of said goods, chattels and property, but that the chattels were incumbered by a chattel mortgage bearing date of March 17, 1926; that the mortgagee, a corporation, asserted its title and took possession of said property, thereby depriving the plaintiffs of the same; charges that the plaintiffs had no knowledge of the existence of said chattel mortgage. This statement of claim was verified, and attached thereto was a copy of a bill of sale, from which it appears that August Pocius of the City of Chicago, party of the first part, in consideration of the sum of \$2,300.00 in hand paid, at or before the delivery of these presents, by Peter Branson and Petronela Branson, has bargained and sold the chattels in question to the parties of the second part, and did warrant and defend the property and chattels against any legal claims or demands of any person whomsoever, and signed, "August Pocius and Anale Pocius." It was acknowledged by August Pocius alone.

The affidavit of merits filed by both defendants jointly and sworn to, neither admits nor denies that they warranted the goods described, and neither admits nor denies that the instru-

(c) That the verdict and judgment be not contrary to the findings and conclusions with the statement of facts.

The statement of claim charges that on or about the 27th day of June, 1937, in consideration of the sum of \$5,000.00 the defendants conveyed and warranted to the plaintiff certain goods, chattels and interests, (setting out the items in detail), which conveyance was made by a bill of sale, a copy of which is attached to and made a part of the statement of claim. It further charges that the defendants conveyed and agreed that the property was free and clear of incumbrances and vouched themselves as the true owners and entitled to well and lawfully dispose of the same; charges that the defendants did not have lawful authority to dispose of said goods, chattels and interests, and that the plaintiff was damaged by a double mortgage bearing date of March 17, 1938; that the mortgage, a copy of which is attached to the statement of claim, charges that the plaintiff thereby depriving the plaintiff of the same; charges that the plaintiff had no knowledge of the existence of said double mortgage. That statement of claim was verified, and attached thereto was a copy of a bill of sale, from which it appears that James T. Jones at New York City, County of New York, in consideration of the sum of \$5,000.00 to have paid, or to believe the delivery of these premises, by deed between him and George H. Jones, has assigned and sold the premises in question to the plaintiff and the second party, and did warrant and defend the premises and interests against any legal claims or demands of any person whatsoever, and signed, "James T. Jones and wife Helen". It was known and judged by James T. Jones.

The affidavit of motive filed by both defendants jointly and severally, without waiver and notice that they intended the goods assigned, and which is attached to the statement of claim, charges that the plaintiff was damaged by a double mortgage bearing date of March 17, 1938; that the mortgage, a copy of which is attached to the statement of claim, charges that the plaintiff thereby depriving the plaintiff of the same; charges that the plaintiff had no knowledge of the existence of said double mortgage. That statement of claim was verified, and attached thereto was a copy of a bill of sale, from which it appears that James T. Jones at New York City, County of New York, in consideration of the sum of \$5,000.00 to have paid, or to believe the delivery of these premises, by deed between him and George H. Jones, has assigned and sold the premises in question to the plaintiff and the second party, and did warrant and defend the premises and interests against any legal claims or demands of any person whatsoever, and signed, "James T. Jones and wife Helen". It was known and judged by James T. Jones.

ment sued upon is a true and correct copy of the bill of sale and alleges that they have no knowledge of the same; admits that the defendants (plural) were the lawful owners of the property and chattel at the time of the sale and deny that they did not own the property free and clear of incumbrance. The defendants deny that the goods were incumbered by a chattel mortgage and deny that the property was taken possession of under said chattel mortgage and deny that it was agreed that the value of the property was \$2,300.00.

Plaintiff took the position that because the bill of sale attached to the statement of claim was signed by but one of the defendants, that, therefore, the statement of claim can not support a judgment against both defendants. The exhibit attached to the statement of claim, however, is no part of the statement of claim and should not be construed as part of it in the consideration of the question involved in this case. Neither can it be made a part of the statement of claim by reference. Casen v. Firemen's Ins. Co. 255 Ill. App. 93.

The statement of claim charges both defendants with having conveyed and warranted certain personal property and chattels to the plaintiffs, and the consideration for the conveyance is sufficiently stated in the statement of claim.

We are compelled to indulge in the presumption that the evidence adduced upon the hearing of the cause was sufficient to establish the liability of the defendants with reference to the bill of sale. The statement of claim, by its allegations, while it may not be complete and may be defectively stated, is sufficient after verdict to support the judgment. The allegations in the statement of claim are against the defendants jointly and the defendants by their affidavit of merits fail to question their liability as jointly liable, if liable at all. It is the duty of a defendant to raise a question

went used upon is a true and correct copy of the bill of sale and
alleges that they have no knowledge of the same; stating that the
defendants (plaintiff) were the lawful owners of the property and that
at the time of the sale and deny that they did not own the property
then and also of immovables. The defendants deny that the goods
were incumbered by a chattel mortgage and deny that the property was
taken possession of under said chattel mortgage and deny that it was
agreed that the value of the property was \$2,500.00.
Plaintiff took the position that because the bill of
sale attached to the statement of claim was signed by one of the
defendants, that, therefore, the statement of claim was not correct
a judgment against both defendants. The exhibit attached to the
statement of claim, however, is in part of the statement of claim
should not be considered as part of it in the consideration of the
question involved in this case. Neither can it be made a part of
the statement of claim as stated. Bill of Sale, Exhibit A, Bill,
THE BILL, Exhibit A,
The statement of claim charges both defendants with
having conveyed and warranted certain personal property and chattels
to the plaintiff, and the consideration for the conveyance is set
identically stated in the statement of claim.
We are compelled to indulge in the presumption that
the evidence adduced upon the hearing of the case was sufficient to
establish the liability of the defendants with reference to the bill
of sale. The statement of claim, by its allegations, states it was
not be complete and may be defectively stated, is sufficient after
verdict to support the judgment. The allegations in the statement of
claim are against the defendants jointly and the defendants by their
affidavit of denial fail to establish their liability as jointly liable
it liable at all. It is the duty of a defendant to raise a question

of misjoinder at the earliest opportunity. Defendants failed to do this, but joined issue with the plaintiffs. They can not now be allowed to raise this question for the first time.

An action of assumpsit will lie to recover for a breach of warranty in the sale of goods and the action as made out by the statement of claim and affidavit of merits is such an action. The bill of sale, although required by the Practice Act to be attached to the statement of claim, is admissible in evidence, together with all the other evidence, to support the claim. We assume that the evidence heard, but not presented here, was sufficient to establish the obligation of the defendants.

Defendants rely upon the case of Launcester, et al. v. Roberts, et al, 144 Ill. 313, in support of the proposition that the fact that the name of Anele Pocius appears only at the bottom of the bill of sale and not in the body of the same, creates no liability on her part. This case was before the Supreme Court, however, on a demurrer to a bill. We assume that the instrument was set out in said bill in haec verba, thereby becoming a part of the same. Such is not the case here. The declaration in this case is sufficient in itself, particularly after judgment. We assume that upon the trial proper proof was made establishing the liability.

We see no reason for reversing the judgment and for the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

of misjoinder at the earliest opportunity. Defendants failed to do
this, and joined issues with the plaintiff. They can not now be
allowed to raise this question for the first time.
The action of respondent will lie to recover for a
breach of contract in the sale of goods and the action is well-
founded by the statement of claim and affidavit of service in which an action.
The bill of sale, although tendered by the plaintiff, is not
attached to the statement of claim, is inadmissible in evidence, being
not given in the proper evidence to support the claim. It is
that the evidence heard, but not presented here, was sufficient to
establish the obligation of the defendants.
Defendants rely upon the case of Roberts v. Roberts, of 11, 12, 13, in support of the proposition that the
fact that the name of a wife is not in the body of the name, creates no liability
the bill of sale and not in the body of the name, creates no liability
in the bill. This case was cited in the Roberts v. Roberts, in a
document to a bill. We assume that the document was not put in and
bill in Roberts v. Roberts, thereby becoming a part of the same. Both is
not the case here. The defendant is not to be held liable in
itself, particularly after judgment, to assume that upon the trial
judgment will be made according to the liability.
We see no reason for reversing the judgment and for
the reasons stated in this opinion, the judgment of the majority
must be affirmed.
JUDGMENT AFFIRMED.
JAMES C. J. AND J. J. J.

35342

MARGARET GALVIN,
DEFENDANT IN ERROR,
v.
JAMES J. GALVIN,
PLAINTIFF IN ERROR.

70 7
ERROR TO

SUPERIOR COURT,

COOK COUNTY.

264 I.A. 630⁴

Opinion filed Jan. 20, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

James J. Galvin, plaintiff in Error, on October 13, 1927, filed his bill of complaint in the Superior Court of Cook County against Margaret Galvin, his wife, defendant in error, here, praying for a decree of divorce. Summons was issued and served and the defendant appeared by her counsel and filed her answer to the bill of complaint. February 25, 1928, notice was served on the solicitor for Margaret Galvin, stating that the complainant (plaintiff in error here) would ask to have said cause placed upon the contested divorce calendar of the Honorable Judge Sabath, who, at that time, was hearing contested divorce cases.

Subsequently, the Honorable Robert E. Gentzel was elected as a judge of the Superior Court and on June 8, 1928, following his election, a notice appeared in the Chicago Daily Law Bulletin to the effect that Judge Gentzel would hear contested divorce and separate maintenance cases from the calendars of Judge Sabath and Judge John J. Sullivan, commencing June 11, and that the list of cases could be found on the calendar on Monday. The case at bar was published in the Chicago Daily Law Bulletin on June 19, 1928, as having been assigned to Judge Gentzel and was set for trial on June 20th. On that day complainant, his counsel and witnesses appeared, but the defendant failed to appear and a decree was entered and notice of such decree published in the Chicago Law Bulletin June 23, 1928.

264 I.A. 630

Opinion filed Jan. 20, 1932

THE COURT
IN SENATE CHAMBER,
JANUARY 20, 1932.
JAMES L. KELVIN, PLAINTIFF IN ERROR,
VERSUS
MARGARET KELVIN, DEFENDANT IN ERROR.
JANUARY 20, 1932.
JAMES L. KELVIN, PLAINTIFF IN ERROR, ON OCTOBER 18, 1927, FILED HIS BILL OF COMPLAINT IN THE SUPERIOR COURT OF COOK COUNTY AGAINST MARGARET KELVIN, HIS WIFE, DEFENDANT IN ERROR, HERE, PETITIONING FOR A DECREE OF DIVORCE. ANSWERS WAS ISSUED AND ANSWERED AND THE DEFENDANT APPEARED BY HER COUNSEL AND FILED HER ANSWER TO THE BILL OF COMPLAINT. JUNE 22, 1928, NOTICE WAS SERVED ON THE DEFENDANT FOR HER APPEARANCE AT THE TRIAL OF THE COMPLAINT. (PLAINTIFF IN ERROR HERE) WOULD NOT HAVE SAID ANYTHING UPON THE TRIAL OF THE COMPLAINT AT THE TRIAL OF THE COMPLAINT, BUT AT THAT TIME, WAS HEARING COUNSELLED DIVORCE CASES. THEREAFTER, THE DEFENDANT APPEARED AT THE TRIAL OF THE COMPLAINT AND WAS HEARD BY THE COURT AND ON JUNE 2, 1928, ELECTED AS A JUDGE OF THE SUPERIOR COURT AND ON JUNE 2, 1928, FOLLOWING HIS ELECTION, A NOTICE APPEARING IN THE CHICAGO DAILY LAW JOURNAL TO THE EFFECT THAT JUDGE KELVIN WOULD BEAT COUNSELLED DIVORCE AND SEPARATE MAINTENANCE CASES FROM THE CHAMBERS OF JUDGE KELVIN AND JUDGE JOHN J. KELVIN, COMMENCING JUNE 11, AND THAT THE LIST OF CASES WOULD BE TOWNED ON THE DEFENDANT ON MONDAY. THE CASE AT BAR WAS PUBLISHED IN THE CHICAGO DAILY LAW JOURNAL ON JUNE 10, 1928, AS HAVING BEEN ASSIGNED TO JUDGE KELVIN AND WAS SET FOR TRIAL ON JUNE 20th. ON THAT DAY COMPLAINT, HIS COUNSEL AND WITNESSES APPEARED, BUT THE DEFENDANT FAILED TO APPEAR AND A DECREE WAS ENTERED AND NOTICE OF SUCH DECREE PUBLISHED IN THE CHICAGO DAILY LAW JOURNAL.

September 21, 1928, defendant, by her counsel, served notice that she would enter her motion to vacate said decree. This motion stated that counsel for defendant would appear before Judge Sabbath and moved to vacate the decree, and an order was entered by that judge setting aside the decree. Subsequently Judge Sabbath, on motion of complainant, vacated the order setting aside the decree on the ground that he did not have jurisdiction and, subsequently, defendant filed her bill of review before Judge Gentsel, asking to have said decree vacated and to be allowed to be heard on the merits of the proceeding. The prayer of the bill of review was granted, the decree set aside and, after a full and complete hearing in which the complainant participated, a finding was had in favor of the defendant and complainant's bill was dismissed for want of equity. To this order complainant excepts and is now here on a writ of error.

The evidence presented at the hearing of the cause is not abstracted and is, therefore, not before us for consideration. We are concerned only with the question as to whether or not the trial court properly vacated the decree and permitted the defendant to come in and defend the action.

Counsel for defendant urges for our consideration the fact that the complainant reserved no exception to the order vacating the decree, but proceeded to a hearing and introduced evidence and they are therefore estopped to question the order of the Superior Court vacating the original decree. The practice in this state, however, appears to be different in chancery than that at law. It has been held that an order of court opening a former decree for rehearing under a bill of review is interlocutory merely, and not the subject of appeal or writ of error. The proper procedure appears to be for the chancellor to hear the entire matter and enter a final decree, which is appealable. Adamaki v. Wiczorek, 170 Ill. 373.

September 21, 1958, defendant, by her counsel, moved for notice that she would enter her motion to vacate said decree. This motion stated that counsel for defendant would appear before Judge Smith and move to vacate the decree, and an order was entered by that judge setting aside the decree. Subsequently Judge Smith, on motion of complainant, vacated the order setting aside the decree on the ground that he did not have jurisdiction and, consequently, defendant filed her bill of review before Judge Smith, asking to have said decree removed and to be allowed to be heard on the merits of the proceeding. The purpose of the bill of review was granted, the decree was set aside and, after a full and complete hearing in which the complainant participated, a finding was had in favor of the defendant and complainant's bill was dismissed for want of equity. To this court complainant appeals and is now here on a writ of error.

The evidence presented at the hearing of the case in said circuit and is, therefore, not before us for consideration. We are concerned only with the question as to whether or not the court properly vacated the decree and returned the defendant to court in and defend the action.

Counsel for defendant argue for our consideration the fact that the complainant reserved an exception to the order vacating the decree, but proceeded to a hearing and introduced evidence and they are therefore supposed to question the order of the Superior Court vacating the original decree. The question is then stated, however, appears to be different in substance than that at issue. It has been held that an order of court setting a former decree for review under a bill of review is unnecessary merely, and that the subject of appeal is that of error. The court's jurisdiction is that for the complainant to have the entire matter set aside a final decree, which is reversible, illegal or otherwise, which is reversible, illegal or otherwise.

It is also insisted that it was the duty of complainant, by his solicitor, to serve notice on the defendant at the time of the decree so handed to the court for signature. It is well known that in this county, on account of the extensive litigation, that such decrees are prepared after the hearing and presented to the court for approval and entry. It is also a well-known fact that such decrees are generally presented to the opposite side for objections before such presentation to the court, for the purpose of allowing a defeated party to provide for an appeal therein and for such corrections as are proper, if desired. We are cited no cases, however, where the defendant has not appeared at the hearing where notice was required before the signing of the decree. Before a cause is reached for trial a party of record is entitled to notice of all motions in the proceeding. We do not consider a decision of this question necessary, however, in view of the position of the court on other points raised by the defendant.

The trial court heard the testimony of the witnesses and examined exhibits and records introduced in evidence, both for and against the bill. From this evidence it appears that prior to the entry of the order of the Executive Committee of the Superior Court, assigning Judge Centzel to hear contested divorce cases, a clerk in the office of defendant's counsel went to the courtroom of Judge Sabath and inquired where the case of Calvin v. Calvin was on the call of Judge Sabath. The clerk of the court showed him the calendar of cases to be tried by Judge Sabath and pointed out on the calendar a line which was drawn above the case of Calvin v. Calvin and informed the clerk of complainant's solicitor that Judge Sabath would not call any of the cases below that line until sometime in September. The clerk of the court testified that Judge Sabath had directed him to inform attorneys and their clerks that he, the court,

had ordered that no case appearing under the line would be called prior to September 1938, at which time a printed calendar would appear in the Daily Law Bulletin.

From the testimony it appears that counsel for the defendant relied upon this and paid no further attention to this case until it came to their notice that the cause had been tried before Judge Gentzel and a decree entered against their client. It also appears from the testimony that the order directing Judge Gentzel to try contested divorce cases, did not direct what cases he was to try, but that this list was made up among the various chancellors in the Superior Court hearing cases of this character. Under the practice in the Superior Court this class of cases appeared on no printed calendar. It is insisted by counsel for complainant that subsequently a list was published after the clerk had given out this information and that this list contained the case of Calvin v. Calvin as assigned to Judge Gentzel; that this assignment appeared in the Daily Law Bulletin, which is well recognized among lawyers as a proper legal channel in which to disseminate such information; that counsel for complainant saw this assignment of cases and proceeded to take care of it when reached on Judge Gentzel's call and that defendant's counsel should have done the same. On the other hand counsel for defendant insists that he had a right to rely upon the order of Judge Sabath and the information of the clerk to the effect that the case would not be reached before September and, not being interested in Judge Gentzel's call, was not required to search it for the purpose of finding out whether or not the case at bar was upon that call.

Judge Gentzel in his order setting aside the decree found that when the cause came on for hearing before him, and he inquired of counsel for complainant, in substance, if he knew of any reason why counsel for defendant was not there and that the counsel

had stated that no cross examining under the line would be called
prior to September 1938, at which time a printed statement would
appear in the Daily Law Bulletin.
From the testimony it appears that counsel for the
defendant relied upon this and paid no further attention to the
fact that it was in fact stated that the court had said that
before Judge Gantzel and a decree entered against their client.
It also appears from the testimony that the other directing Judge
Gantzel to try contested divorce cases, did not direct what cases
he was to try, but that this list was made up among the various
counselors in the Superior Court hearing cases of this character.
Under the practice in the Superior Court this class of cases appears
as no proper subject. It is included by counsel for complainant
that complainant's list was prepared after the court had given
out this information and that this list contained the case of Calvin
v. Calvin as assigned to Judge Gantzel; that this assignment appears
in the Daily Law Bulletin, which is well recognized among lawyers as
a proper legal channel in which to disseminate such information;
that counsel for complainant saw this assignment of cases and
endeavored to take care of it when reached on Judge Gantzel's call
and that defendant's counsel should have done the same. On the
other hand counsel for defendant insists that he had a right to rely
upon the habit of Judge Gantzel and the instruction of the clerk to
the effect that the case could not be reached before September and
not being interested in Judge Gantzel's call, was not required to
appear at the court at that time and should be set the case
at that time upon that call.
Judge Gantzel in his order setting aside the decree
found that when the case came on for hearing before him, and he
indicated at counsel for complainant, in substance, if he was to say
before any court the defendant was not there and that the counsel

for complainant stated that he did not know of any such reason, and that this statement was in error and, if known to the court, would have resulted in the court's refusal to hear the cause until defendant had been notified.

We are of the opinion that at the time the clerk in Judge Sabath's court exhibited the calendar to counsel for defendant and stated that it would not be tried until September, he was acting as an officer of the court, was the proper one to consult as to the status of the case, and that the solicitor for defendant was warranted in relying on his statement.

This court in the case of Toth v. Samuel Phillinson & Co., 250 Ill. App. 347, held:

"The clerk is an officer of the court and it is his duty to note its orders that are to be subsequently spread of record. He was the proper one to consult as to the status of the case and was supposed to know and note the orders of the court, and we think plaintiff was warranted in relying upon his statement as to what they were and was not required to verify the same by consulting his minutes. The clerk, however, was mistaken and here as in the Madden case misled plaintiff and indirectly the court. We think, therefore, the case was properly reinstated."

Counsel for defendant in the case at bar was diligent as shown by his examination of Judge Sabath's calendar after the case had been placed thereon, evidently for the purpose of informing himself as to the position of the cause on the call and the chance of its being reached, and when:

The case of Izzi v. Talengo, 248 Ill. App. 90, is very much in point. In that case it appears that a judgment was entered against the defendant by default; that it appeared that an announcement was printed in the Daily Law Bulletin under the heading, "Daily Municipal Court record", stating that it was to be called on a certain date; that it was reached and tried and judgment entered. Counsel for defendant in that case introduced evidence showing that he had been misinformed by the clerk of the court and had a meritorious defense to the cause of action. The court in

its opinion, said:

"We have carefully read the evidence and are satisfied that the attorney for the defendants acted in good faith and that he made an examination of the calendar at the office of the clerk of the municipal court, and that such examination did not disclose that the case was on that calendar. He was diligent, not negligent, and whether a mistake was made by the clerk or by the attorney, we think that equitably the judgment ought not to stand provided the defendants have a meritorious defense."

The mistake of counsel for defendant in relying upon the statement of the clerk to the effect that the case would not be reached until September was one of fact and not of law, and it was proper for the trial court to entertain the bill of review under the facts set out in the proceeding at bar. Madden v. City of Chicago, 283 Ill. 165, People v. Bruno, 346 Ill. 448.

The chancellor after hearing the evidence found the issues in favor of the defendant and, not having the evidence before us for consideration, we are compelled to consider the finding of the chancellor as fully sustained by the evidence. A denial of the right to file the bill of review would be a denial of substantial justice under the circumstances, particularly in view of the fact that it is a divorce proceeding and the dissolution of the marriage relation is one of grave importance, Trenchard v. Trenchard, 345 Ill. 313.

We are of the opinion therefore, that the decree of the Superior Court should be and it hereby is affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

35843

PROVUS BROS. CO.,
a corporation,

(Complainant) Appellant,

v.

WEST END PINE BUILDING CORPORATION,
a Corporation, et al.,

Defendants,

RUSSELL FIREBAUGH, as Trustee,
(Petitioner) Appellee.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY.

264 I.A. 630⁴

Opinion filed Jan. 20, 1932

MR. JUSTICE WILSON delivered the opinion of the court.

Provus Bros. Co., a corporation, filed its bill in the Circuit Court to foreclose its second mortgage executed and delivered by the West End Pine Building Corporation on certain real estate in the City of Chicago.

On August 10, 1931, a receiver was appointed at the instance of the complainant and filed its bond and acceptance.

August 31, 1931, upon notice to the complainant, one Russell Firebaugh filed his verified petition in said proceeding in the Circuit Court, asking for an extension of the receivership. The petition alleges in substance that on August 27, 1931, Russell Firebaugh had filed his bill, to foreclose a first trust deed upon the premises in question, in the Superior Court of Cook County; the petition proceeds to set forth the bill filed by him in the Superior Court and from this bill it appears, that the West End Pine Building Corporation had executed its 795 bonds aggregating \$335,000, and executed and delivered its trust deed to the premises (which were the same premises involved in this proceeding in the Circuit Court) to Firebaugh, as trustee, to secure the payment of said bonds. The bill charges that there has been a default in principal and interest and

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THE CHICAGO TRADING COMPANY, INC.

(Incorporated in Illinois)

THE CHICAGO TRADING COMPANY, INC.

CHICAGO, ILLINOIS

CHICAGO, ILLINOIS, 11/11/1933

CHICAGO, ILLINOIS, 11/11/1933

88414.880

Opinion filed Jan. 30, 1933

MR. JUSTICE ALDRICH delivered the opinion of the court.

THE CHICAGO TRADING COMPANY, INC., a corporation, filed its bill in

the Illinois Court to foreclose its second mortgage executed and

delivered by the first and five existing owners of certain real

estate in the City of Chicago.

On August 10, 1931, a receiver was appointed of the

instance of the complaint and filed the bond and answered.

August 11, 1931, when notice to the complaint, was

received. The Illinois Court was notified by the receiver that

the Illinois Court, being set in Chicago at the residence of the

receiver, was in session on August 11, 1931, and

through the Illinois Court, the receiver was notified that

the receiver was in session, in the Superior Court of Cook County, the

receiver proposed to set down the bill filed by him in the Superior

Court and that bill is set down, that the first and five existing

Corporation has answered the two bonds executed by the

receiver and delivered to the first and five existing owners of the

same real estate involved in this proceeding in the Illinois Court to

foreclose, as provided, in favor of the receiver of said bonds. The bill

charges that there has been a default in payment and interest and

that the trustee has declared the entire amount due and payable. The bill charges that the fair market value of the property does not exceed \$300,000 and is inadequate protection for the holders of the first mortgage bonds; charges that the trust deed mortgages to the said Firebaugh, as trustee, the rents, issues and profits of said premises, as well as the real estate described therein. The bill prays that said trust deed be declared a first valid lien on all the property and that the defendant West End Pine Building Corporation be ordered to pay the amount of the bonds in default or the premises sold. It contains also a prayer for the appointment of a receiver and such other and further relief as may be necessary.

On September 3, 1931, the Circuit Court entered an order extending the receivership in the case of Provus Bros. Co. v. West End Pine Building Corporation, to the case of Firebaugh v. West End Pine Building Corporation then pending in the Superior Court. From this order an appeal was prayed and allowed to this court.

Complainant insists that the order is erroneous for the reasons, (a) that Firebaugh, as trustee, did not apply for or procure the entry of an order granting him leave to intervene or making him a party to the second mortgage foreclosure procedure in the Circuit Court; and (b) that the copy of the bill of complaint of Firebaugh in the Superior Court did not state sufficient cause for the appointment of a receiver.

Both of these questions have been settled adversely to complainant in this court by the decisions in the cases of Goldberg v. Hoffman, et al, 263 Ill. App. 112, and Seegren v. Becker, et al, Gen. No. 35606 (not yet reported). It was held in those cases that the contention that petitioner was not entitled to an extension because he did not obtain an order granting him leave to intervene and be made a party to the second mortgage foreclosure proceeding was

without merit. It was also held that a receiver having already been appointed upon the bill of complaint of the second mortgage creditor, it was not necessary to scan the bill of complaint filed by the first mortgage creditor. The petition asked only for the extension of the receivership and not for the appointment of a receiver. Both of these questions having been settled by this court, it becomes unnecessary to extend this opinion further than by a reference to these cases.

We see no reason for disturbing the order of the Circuit Court and that order will therefore be and hereby is affirmed.

ORDER AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

35370

IRMA HORVITZ,
Appellee,

vs.

HERBERT WOLFSON,
Appellant.

727
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 631'

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse an order entered August 18, 1931, by the Superior court of Cook county overruling his motions to recall and quash the capias, to correct the record, and for a new trial.

October 1, 1928, plaintiff brought an action against Herbert Wolfson and Jeremiah Murphy to recover damages claimed to have been sustained by plaintiff on account of an assault and false arrest. Afterwards the defendant Murphy died and the suit was dismissed as to him. The case was put at issue and went to trial before a jury on February 3, 1930, before his Honor Judge Rebel, and the following day the jury returned its verdict finding the defendant guilty and assessing plaintiff's damages at \$612.50. February 15th the defendant's motion for a new trial was sustained and the cause set for trial April 14, 1930. The case was reached for trial May 21, 1930, there was a trial before the court without a jury, and the defendant was again found guilty and plaintiff's damages assessed at \$750. Judgment was entered on the finding and eight days later, May 29th, an order appears in the record - "On this day comes the defendant and enters herein his motion for a new trial in said cause, which said motion is hereby entered and continued to the third of June, A. D. 1930."

Nothing further appears until about fourteen months afterwards, when, on July 17, 1931, defendant filed a notice and

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By this appeal the defendant seeks to reverse an order entered August 18, 1931, by the District Court of Cook County overruling his motion to recall and grant the writ, to correct the record, and for a new trial.

On May 1, 1931, Plaintiff moved to dismiss the writ of Habeas Corpus and to set aside the order of the District Court of Cook County entered August 18, 1931, by which the writ was granted. The motion was denied. The case was set for trial before a jury on February 8, 1932, before his Honor Judge Ladd, and the following day the jury returned its verdict finding the defendant guilty and recommending a sentence of death. The case was set for trial April 14, 1932. The case was reached for trial May 21, 1932, there was a trial before the court without a jury, and the defendant was again found guilty and Plaintiff's damages assessed at \$7500. Judgment was entered on the finding and right days later, May 23rd, an order appears in the record - "On this day the defendant was found guilty of the crime of murder in the first degree and sentenced to death by hanging by the neck until dead."

The trial of May 21, 1932, was held in the Court of Cook County, Illinois, before his Honor Judge Ladd, and the jury was composed of twelve men, and the defendant was found guilty of the crime of murder in the first degree and sentenced to death by hanging by the neck until dead.

petition in which he prayed that the casius theretofore issued under the judgment be recalled. The petition set up inter alia that the petitioner was not familiar with legal procedure; that on May 21, 1930, someone telephoned him to go to Judge Hebel's court room; that he appeared and was informed by the court that the case was to be tried; that the petitioner informed the court that his attorney was not in court, and after endeavoring to get in touch with his attorney found he was at Joliet; that the petitioner told the court he did not want to go to trial without his counsel and that he wanted a jury; that the case was called and heard by the court, and there was a finding for plaintiff for \$750;^{that} petitioner was told by the court that a motion for a new trial would be entered and heard on June 3rd following; that on June 3rd petitioner appeared before Judge Hebel and was told that the matter would not be heard that morning, but that petitioner would be informed later when to appear again; that petitioner heard nothing further until February 14, 1931, when he was arrested on a casius issued pursuant to the judgment; that the petitioner then went to the County court and was released but was afterwards remanded to the custody of the sheriff. Other matters are set up which we think are unnecessary to mention here.

Plaintiff filed a sworn answer to the petition in which she set up that the case was set for trial April 14, 1930, and was on the trial call continuously thereafter until May 21st. She specifies 22 different days between April 14th and May 21st on which the case was on Judge Hebel's trial call, that the defendant was in attendance on each of said days and was not taken by surprise when the case was reached on May 21st. The answer denies that when the case was called on the 21st the Judge told defendant that no jury was necessary, but it avers that defendant informed the court

petition in which he prayed that the writs be issued under the judgment be recalled. The petition set up that the petitioner was not familiar with legal procedure; that on May 21, 1930, someone telephoned him to go to Judge Hebel's court room; that he appeared and was informed by the court that the case was to be tried; that the petitioner informed the court that his attorney was not in court, and after endeavoring to get in touch with his attorney found he was not listed; that the petitioner told the court he did not want to go to trial without his counsel and that he wanted a jury; that the case was called and heard by the court, and there was a finding for plaintiff for \$7500; that the petitioner was told by the court that a motion for a new trial would be entered and heard on June 2nd following; that on June 2nd the petitioner appeared before Judge Hebel and was told that the matter would not be heard that morning, but that petitioner would be informed later when he was first heard. On September 1st the case was called for trial. On September 14, 1931, when he was arrested on a warrant issued pursuant to the judgment; that the petitioner then went to the County Court and was released but was afterwards remanded to the custody of the sheriff. Other matters are set up which we think are unnecessary to mention here.

Plaintiff filed a sworn answer to the petition in which she set up that the case was set for trial April 14, 1931, and was on the trial call continuously thereafter until May 21st. The specified differences between April 14th and May 21st on which the case was set for trial were: that the petitioner was in attendance on each of said days and was not taken by surprise when the case was resumed on May 21st. The answer denies that the case was called on the 21st the judge told defendant that no jury was necessary, but it avers that defendant intended the court

he did not want a jury trial, and thereupon a jury was waived by agreement of the parties and the cause heard without objection; that the court heard the testimony of both parties and that plaintiff and her witnesses were cross-examined by defendant. The answer further sets up that the motion for a new trial was made May 29th but that it was not authorized by law or the rules of practice; that the judgement being wholly unsatisfied, plaintiff on or about February 6, 1931, caused a caapias to be issued and the petitioner was arrested by the sheriff of Cook county; that afterwards defendant filed his petition in the County court to be released under the Insolvent Debtor's act and a hearing was there had which resulted in the court finding that malice was the gist of the action in which judgment was rendered, and the petitioner was remanded to the custody of the sheriff; that the defendant prayed and was allowed an appeal from the judgment of the County court to this court but that said appeal was subsequently dismissed and the defendant re-arrested under the caapias.

On the hearing before Judge Hebel, on the defendant's motions above mentioned, a number of affidavits were offered, a witness testified, and records of the Superior court were introduced in evidence. Afterwards the motions were denied and the defendant appeals.

On the hearing of defendant's motions he offered in evidence the minute made by the clerk on May 21, 1930, when the case was heard. The minute is as follows: "Fdg. Deft. City and assess Plff's dam. at the sum of \$750.00 Judgt. on Fdg." From this minute the clerk wrote up the amplified order, which is as follows:

"This cause being called for trial come the parties to this suit by their attorneys respectively and thereupon by the agreement of said parties now here made in open court this cause is submitted to the Court for trial without a jury and the Court after

he did not want a jury trial, and thereupon a jury was waived by agreement of the parties and the court heard without objection; that the court heard the testimony of both parties and that during the trial the witnesses were cross-examined by defendant. The court further noted that the motion for a new trial was made May 28th, 1933, and that it was not authorized by law or the rules of practice; that the judgment being wholly unimpaired, plaintiff on or about February 8, 1933, caused a writ of habeas corpus to be issued and the defendant was arrested by the sheriff of Cook County; that afterwards defendant filed his petition in the County Court to be released under the Habeas Corpus Act and a hearing was there had which resulted in the court finding that motion was the gist of the motion in which judgment was rendered, and the defendant was remanded to the custody of the sheriff; that the defendant stated and was allowed on appeal from the judgment of the County Court to this court but that said appeal was subsequently dismissed and the defendant re-arrested under the writ.

On the hearing of defendant's motion he offered in evidence three affidavits, a number of exhibits were offered, and the court at the hearing heard the testimony of the witnesses. Afterwards the motion was denied and the defendant appealed.

On the hearing of defendant's motion he offered in evidence the minute book by the clerk on May 21, 1933, when the case was heard. The minute is as follows: "Jury. Both. City and County Pitt's Hon. at the sum of \$250.00. Judgment on \$250.00. From this minute the clerk reads the amplified order, which is as follows: 'This cause being called for trial upon the motion to set aside of this court's judgment and rendered by the agreement of said parties now made in open court this cause is submitted to the court for trial without a jury and the court after

hearing all of the evidence adduced and being fully advised in the premises finds the defendant guilty and assesses the plaintiff's damages at the sum of Seven Hundred and Fifty Dollars.

"Therefore it is considered by the Court that the plaintiff Irma Horwitz do have and recover of and from the defendant Hervert Wolfson her said damages of Seven Hundred and Fifty Dollars in form as aforesaid by the Court assessed together with her costs and charges in this behalf expended and have execution therefor."

Defendant in his brief and argument repeatedly states that the judgment order above quoted was not authorized by the memorandum made by the minute clerk, but at no time does he point out in any particular whatever any disagreement between the minute and the order; but his argument, after making the contention stated, is that the affidavits which the defendant filed showed that the defendant was not represented by counsel at the time of the trial, and that a jury was not waived. What took place on the trial of the cause on May 21st is not in the record, there being no bill of exceptions.

We think it obvious that both parties were negligent in failing to have the motion for a new trial disposed of. Counsel for plaintiff contends that the case being tried before the court without a jury, a motion for a new trial was unwarranted under the practice and wholly ineffective. The trial court, however, in passing on the question treated the matter as though it were properly before him, and we think we would not be warranted, in these circumstances, in holding that the motion was ineffective. It is obvious that both parties were remiss in failing to have the motion disposed of shortly after it was made, and especially in view of the fact that the trial Judge had ^{been} assigned to this court

hearing all of the evidence adduced and being fully advised in the premises finds the defendant guilty and assesses the plaintiff's damages at the sum of Seven Hundred and Fifty Dollars.

"Therefore it is considered by the Court that the plaintiff is entitled to have and recover of and from the defendant the sum of Seven Hundred and Fifty Dollars together with her costs and charges in this behalf expended and her reasonable attorney's fees."

Defendant in his brief and argument repeatedly stated that the judgment order above quoted was not authorized by the memorandum made by the minute clerk, but at no time does he point out in any particular whatever any disagreement between the minute and the order; but his argument, which states the memorandum states that the affidavit which the defendant filed showed that the defendant was not represented by counsel at the time of the trial, and that a jury was not waived. What took place on the trial of the cause on May 21st is not in the record, there being no bill of exceptions.

We think it evident that both parties were negligent in failing to have the action for a new trial discussed at counsel for plaintiff contends that the case being tried before the court without a jury, a motion for a new trial was unnecessary under the practice and wholly ineffective. The trial court, however, in granting on the question treated the matter as though it were properly before him, and we think we would not be warranted, in these circumstances, in holding that the motion was ineffective. It is obvious that both parties were misled in failing to have the motion discussed at shortly after it was made, and especially in

and would not be as likely to recall matters of this character as he would were he still sitting in the trial court.

But on the record before us it is conceded that the defendant was not represented by counsel on the trial of the case. It appears that he was unfamiliar with the law and procedure. It was not called to his attention that in case a judgment were rendered against him he might be sent to jail unless the judgment were paid, although he had no money with which to make the payment. Since the defendant's liberty is at stake, we think his motion for a new trial should have been allowed, and for the reason stated the order appealed from is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

and would not be as likely to reveal matters of this character as he would were he still sitting in the trial court.

For on the second day, as it is recorded that the

defendant was not represented by counsel on the trial of the case.

It appears that he was familiar with the law and procedure. It

was not called to his attention that in such a case a defendant was not

debarred against him he might be sent to jail unless the judge

were paid, although he had no money with which to make the payment.

Since the defendant's liberty is at stake, we think his motion for

a new trial should have been allowed, and for the reason stated.

The order appealed from is reversed and the same remanded for

further proceedings in accordance with this opinion.

REVEREND AND HONORABLE

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35455

JOHN ROSEY,
Appellee,

vs.

CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

73 14
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 631²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries claimed to have been sustained by him through the negligence of the defendant in failing to keep a certain sidewalk in a reasonably safe condition. There was a jury trial, a verdict and judgment in plaintiff's favor for \$12,700, and the defendant appeals.

The record discloses that about two o'clock on the afternoon of May 21, 1930, plaintiff, a man about 23 years old, was walking east on the sidewalk on the south side of West 19th place, Chicago. The sidewalk was about 5 feet wide, made of concrete slabs about 6 feet in length. The east end of one of these slabs was pressed down or sunk a few inches, while the west end of it was raised two or three inches higher than the slab immediately to the west of it. About six or eight inches of the west end of the slab had been broken or crumbled off, and had been in this defective condition for more than fifteen years.

Plaintiff testified that about two o'clock in the afternoon he was walking east on the south sidewalk, going to repair an automobile which was standing a short distance east of the place where he was injured, and that he stepped over the broken place in the slab with his right foot and when he put his weight on that foot the cement under his heel crumbled and broke - "a piece of cement about seven or eight inches long, about three

73

STATE OF ILLINOIS
COUNTY OF COOK
JANUARY 1931

2841.A.631

IN SENATE
JANUARY 1931

Witness presented an affidavit in support of the petition for a writ of habeas corpus. The witness stated that he was present at the scene of the crime and saw the defendant being taken to the hospital. The witness also stated that he saw the defendant being taken to the hospital and that he saw the defendant being taken to the hospital.

The record discloses that about two o'clock on the afternoon of May 21, 1930, Plaintiff, a man about 28 years old, was walking east on the sidewalk on the south side of West 12th place, Chicago. The sidewalk was about 6 feet wide, made of concrete slabs about 6 feet in length. The east end of one of these slabs was pressed down at least a few inches, while the west end of it was raised two or three inches higher than the other immediately to the west of it. About six or eight inches of the west end of the slab had been broken or crumpled off, and had been in this defective condition for more than fifteen years.

Plaintiff testified that about two o'clock on the afternoon he was walking east on the north sidewalk, when he fell on a manhole which was situated a short distance west of the place where he was injured, and that he slipped over the broken place in the sidewalk which was about two feet wide and was about two feet deep. He testified that he fell on his back and that he was injured.

inches wide, broke off. As I stepped on the piece that crumbled under my heel the leg went out and I felt a sharp pain*** I fell on my hands and left knee; my right knee did not go to the ground.*** I felt a sharp pain and heard a crack. I fell forward with the two hands on the ground and the left knee on the ground and this leg underneath;" that he saw the broken place in the sidewalk and stepped over it, that "it sure did look solid to me. There was nothing about it that looked dangerous to step on, outside of the part that was already broken up there. The part where I stepped looked perfectly solid."

The evidence further tends to show that plaintiff's right kneecap was broken; that he was taken in the police ambulance to the hospital, where he was operated upon and the two pieces of the kneecap sewed together. It further appears from the evidence that some years before the accident plaintiff had his left leg amputated above the knee so that he wore an artificial limb; that he wore straps over his shoulders so that in walking he could operate the artificial limb; that for a few years immediately before the accident he was an automobile mechanic engaged in repairing automobiles, but that since the accident he has not been able to do that work.

Two photographs of the sidewalk at the place in question are in the record. They were taken on the same day by the same photographer. One was taken from the north side of the place in question with the camera apparently facing directly south; the other was taken from apparently a short distance west of the defect in the sidewalk with the camera apparently facing east. Looking at these two photographs, no one would think they were showing the same defect in the sidewalk, but the evidence is undisputed that the two pictures show the same defect. We mention this fact here because the jury might have been somewhat misled as to the nature of the defect in the sidewalk.

inches wide, double etc. As I stepped on the plane that extended under my feet the leg went out and I felt a sharp pain. I fell on my hands and felt loose; my right knee did not go to the ground. I felt a sharp pain and went a step. I fell forward with my hands on the ground and the left knee on the ground and this leg unbalanced; "What he saw the broken piece in the sidewalk and stopped over it, that "it was his foot solid in me. There was a sharp pain in that broken pavement to step on, outside of the part that was already broken up there. The part where a sharp sharp, perfectly solid."

The witness further feels he knew that plaintiff's right leg was broken; that he was taken in the police station at the hospital, where he was operated upon and the two pieces of the leg were set in place. It is further stated that the witness was some hours before the accident plaintiff had his left leg amputated above the knee so that he was on artificial limb; that he wore a brace with his right leg so that in walking he would operate the artificial limb; that for a few years immediately before the accident he was an automobile mechanic engaged in repairing automobiles. That since the accident he has not been able to work with his right leg. The photographs of the sidewalk at the place in question are in the record. They were taken on the same day by the same photographer. As was seen from the report of the plane in question with the camera apparently falling directly down; the other was taken from apparently a short distance west of the defect in the sidewalk with the camera apparently falling east. Looking at these two photographs, as they would look from the point of view of the witness, but the evidence is uncontroverted that the two witnesses saw the same defect. It is also true that none of the the jury will have been maintained as to the nature of the defect in the sidewalk.

There is other evidence in the record, but since we have reached the conclusion that there must be a new trial because the court refused to give an instruction requested by the defendant, we do not discuss it further.

We think there is no merit in the defendant's contention that the court erred in refusing to direct a verdict in its favor as requested on the ground that there was no evidence tending to show that the plaintiff was in the exercise of due care for his own safety. We think that question was a proper one for the jury, under proper instructions.

Defendant's refused instruction is as follows: "The court instructs the jury that it is not the duty of the city in the construction and repair of its sidewalks to provide against injury to persons in a crippled or infirm condition any further than for persons having ordinary use of their physical powers; all it is required to do is to use ordinary care to keep the walks in a reasonably safe condition for persons using ordinary care and with ordinary capacity to care for themselves, and in that case if you believe from the evidence that the plaintiff is crippled or is infirm and is thereby less able to care for and protect himself than persons having the ordinary use of their physical powers, he would be required to take such additional care and precaution as his condition reasonably requires." We think this instruction should have been given. City of St. Vernon v. Brooks, 39 Ill. App. 426; Smith v. City of Cairo, 48 Ill. App. 166; Toledo, Peoria & Western Ry. Co. v. Hammett, 220 Ill. 9,

These cases hold that a crippled or infirm person, to be in the exercise of ordinary care, must be more circumspect than one who has the use of all his faculties.

There was no instruction given on this point and under

There is other evidence in the record, but since we
must regard the conclusion that there must be a new trial because
the court refused to allow an instruction suggested by the defense,
we are not disposed to further
The fact that there is no error in the defendant's conclusion
that the court erred in refusing to allow a verdict in the favor
as requested on the ground that there was no evidence showing it
that the plaintiff was in the exercise of due care for his
own safety. We think that question was a proper one for the jury,
under proper instructions.

Defendant's proposed instruction is as follows: "The
court instructs the jury that it is not the duty of the city in
the construction and repair of its sidewalks to provide against in-
jury to persons in a vehicle or to persons walking thereon."
The persons having ordinary use of their physical powers; all it is
required to do is to not negligently cause the sidewalk to be
only such condition for persons using ordinary care and with ordinary
caution to come for themselves, and in that case it was held
from the evidence that the sidewalk is situated on its surface and
is thereby safe to come for and travel along it, and persons
having the ordinary use of their physical powers, he would be re-
quired to take such additional care and precaution as his condition
reasonably requires." It is held that defendant's proposed instruction
given. City of St. Paul v. Hanson, 130 Minn. 400, 151 N.W. 211, 1917.
City of St. Paul v. Hanson, 130 Minn. 400, 151 N.W. 211, 1917.
The court, 130 Minn. 400, 151 N.W. 211, 1917.
There is no error in the defendant's conclusion, in the
in the exercise of ordinary care and with ordinary caution, that
was not one of all the reasons.

There was no instruction given on this point and under

the law the defendant was entitled to have the jury instructed as to the law on this question. For the refusal of the court to give this instruction, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

The law the defendant was entitled to have the jury instructed
as to the law on this question. Not the trial at the court.
to give this instruction, the defendant is entitled to the
same remedy.

Respectfully,
[Signature]

Respectfully and Sincerely,
[Signature]

35503

ETHEL FELICK,
Appellee,

vs.

HARVEY L. KAY and MARY A. KAY,
Appellants.

74
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 631³

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse a judgment of \$85 entered against them in a trial before the court without a jury.

November 21, 1930, plaintiff filed an affidavit of attachment against the defendants claiming \$85, \$82.50 of which was for rent for the premises known as 2800 North Bernard street, Chicago, for the month beginning November 3rd and ending December 2, 1930, and \$2.50 paid by the plaintiff for protesting a check of defendants on which they had stopped payment.

The record discloses that on Sunday, November 2, 1930, the defendants called on plaintiff with a view of renting an apartment and on that day examined the apartment. The next morning they again examined the apartment, and with plaintiff went to see her husband at his office with a view of entering into a lease for the apartment for a period of about eleven months. After some negotiations it was stated by all parties that the defendants would rent the apartment and a garage in the rear for \$82.50 a month, and plaintiff agreed that she would do certain cleaning and decorating. At that time defendants gave plaintiff a check for \$22.50 as a deposit, and it was agreed by all parties that plaintiff's husband would prepare a written lease which defendants were to execute. Plaintiff's husband afterwards prepared a written lease and submitted it to defendant Harvey L. Kay for his signature, he being named in the proposed lease as the tenant. Before signing the

STATE OF TEXAS

County of ...

vs.

HARVEY E. HAY and HARRY A. HAY,
Defendants.

IN SENATE

January 1, 1934

3641 A. 031

THE STATE OF TEXAS, COUNTY OF ...

By ...

rent of \$55 entered against them in a trial before the court sitting
a jury.

November 11, 1933, Plaintiff filed an affidavit of
affidavit against the defendants claiming \$55, \$50.00 of which was
for rent for the premises known as 2800 North ... street, ...
for the month beginning November 1st and ending December 1,
1933, and \$5.00 paid by the plaintiff for protecting a check of
retention on which they had received payment.

The record discloses that on Sunday, November 11, 1933,
the defendant called on plaintiff with a view of renting an apart-
ment and on that day examined the apartment. The next morning they
again examined the apartment, and with plaintiff went to see her
husband at his office with a view of obtaining into a house for the
apartment for a period of about eleven months. After some negotia-
tions it was stated by all parties that the defendant would rent
the apartment and a check for \$55.00 was made, and
plaintiff stated that she would be making a check and returning
at that time defendant gave plaintiff a check for \$55.00 as a de-
posit, and it was agreed by all parties that plaintiff's husband
would prepare a written lease and the defendants were to execute.
Plaintiff's husband afterwards prepared a written lease and on
after it is returned back to her the next day, he being
bound to the premises from the time he signed the lease.

lease, Kay wanted to submit it to his counsel, and there is evidence tending to show that there was a delay on this account.

The defendants testified that on Tuesday evening, November 3rd, plaintiff's husband asked whether the lease had been signed, and was advised that it had not because of inability of defendants to submit it to their counsel. They further testified that plaintiff's husband at that time stated that he had not yet employed a decorator to do the work in the apartment, and that they told him they would not sign the lease.

This testimony was denied by plaintiff's husband, who testified that it was not until Thursday that the defendants refused to execute the lease. Plaintiff's evidence is further to the effect that most of the cleaning and decorating had been completed by November 6th. The evidence further shows that defendants never occupied the apartment but rented another on November 6th.

Plaintiff's contention is that there was an oral and binding contract entered into at the time defendants made the deposit of the \$22.50. On the other hand, the defendants' position is that it was the intention of all parties that the agreement should not become binding unless and until a written lease was executed, and under the law the intention is controlling. W. T. Grant Co. v. Jaeger, 224 Ill. App. 536; National Union Bldg. Assoc. v. Knab, 177 Ill. App. 649; Jenkelson v. Ruff, 64 N.Y. Supp. 40.

Upon a careful consideration of all the evidence, we are of the opinion that the contention of the defendants must be sustained. All of the evidence shows that plaintiff did not consider the contract binding until the written lease was signed. The fact that plaintiff was insisting upon the written lease being signed by defendant Harvey L. Kay is, we think, conclusive that plaintiff did not understand that the oral agreement was binding

James, Ray wanted to submit it to his counsel, and there is

evidence tending to show that there was a delay on this account.

The statement furnished last to Justice's office,

November 2nd, Plaintiff's husband asked whether the lease had

been signed, and was advised that it had not because of inability

of defendants to submit it to their counsel. They further stated

that that Plaintiff's husband at that time stated that he had not

yet obtained a license to do the work in the apartment, and

that they told him they would not sign the lease.

This testimony was denied by Plaintiff's husband,

and testified that it was not until December that the statement

was made to the lease. Plaintiff's evidence is further

in the effect that out of the clearing and decorating had been

completed by November 2nd. The evidence further shows that the

landlord never issued the apartment and rented another on

November 2nd.

Plaintiff's contention is that there was an oral and

binding contract entered into at the time the statement was made

that it was the intention of all parties that the apartment

should not become binding unless and until a written lease was

executed, and until the time the apartment was completed. It is

the fact that the statement of all parties that the apartment

should not become binding unless and until a written lease was

executed, and until the time the apartment was completed. It is

the fact that the statement of all parties that the apartment

should not become binding unless and until a written lease was

executed, and until the time the apartment was completed. It is

the fact that the statement of all parties that the apartment

should not become binding unless and until a written lease was

executed, and until the time the apartment was completed. It is

the fact that the statement of all parties that the apartment

upon the parties. Moreover, the written lease which plaintiff's husband delivered to defendant Harvey L. Ray for his signature, was variant from the oral negotiation between the parties in a number of particulars. It contained the usual provisions found in printed leases in Chicago that "Lessee has examined such premises prior to and as a condition precedent to his acceptance and the execution hereof, and is satisfied with the physical condition thereof, and his taking possession thereof shall be conclusive evidence of his receipt thereof in good order and repair,"* and (the lessee) likewise agrees and admits that no agreement or promise to decorate, alter, repair or improve said premises either before or after the execution hereof, not contained herein, has been made by Lessor or his agent."

The oral agreement, according to all of the evidence, was that the landlord was to decorate and repair certain parts of the apartment. There are a number of other provisions usually found in such leases that were in no way touched upon in the oral negotiations between the parties. Holding as we do that there was no binding agreement entered into between the parties, the judgment of the Municipal court of Chicago is reversed with a finding of fact.

JUDGMENT REVERSED WITH A FINDING OF FACT.

McSurely and Hatchett, JJ., concur.

FINDING OF FACT.

We find as a fact that there was no binding contract entered into between the parties for the rental of the apartment.

upon the parties, respectively, the original contract with the plaintiff's husband delivered to defendant Harvey D. Day for his signature, was variant from the oral negotiation between the parties in a number of particulars. It contained the usual provisions found in printed leases in Chicago that "lessee has examined each room and prior to and as a condition precedent to his acceptance and the execution hereof, and its completion with the physical condition thereof, and his taking possession thereof shall be conclusive evidence of his receipt thereof in good order and repair, and not (the lessee) likewise agrees and admits that no agreement or understanding as to repairs, etc., shall be binding upon him, and that he has seen and after the execution hereof, not contained herein, has been made by lessor or his agent."

The oral agreement, according to all of the evidence, was that the landlord was to decorate and repair certain parts of the apartment. There was a number of other provisions dealing with the apartment that were in no way touched upon in the oral negotiation between the parties. It is to be noted that there was no binding agreement entered into between the parties, the terms of the lease at Chicago is reversed with a finding of fact. JUDGMENT REVERSED WITH A FINDING OF FACT.

Realty and Mortgage, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

REVERSAL OF FACT.

We find on a trial that there was no binding contract entered into between the parties for the rental of the apartment.

33556

RUDOLPH LEDERER,
Appellee,

vs.

RAILWAY TERMINAL & WAREHOUSE
COMPANY, a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

264 I.A. 681⁴

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

In this case plaintiff recovered a judgment for \$56,234 upon the verdict of a jury on the trial of an action to recover damages for loss by fire to certain cases of whisky stored in a room in defendant's warehouse. On appeal to this court we held (257 Ill. App. 24) that while plaintiff made a prima facie case by proving that he had stored the whisky in good condition with defendant and it subsequently was damaged, yet it was well settled "that presumptions are never indulged in where established facts exist; that they supply the place of facts, but when evidence is produced which is contrary to the presumption the presumption vanishes entirely." Lohr v. Barkers Cartage Co., 335 Ill. 335. "Such presumption is not of itself evidence but arises as a rule of evidence and yields to any contrary proof. Presumptions are never indulged in against established facts." Hollenbach v. Blumenthal, 341 Ill. 539. As we were of the opinion that the facts in evidence showed no negligence of the defendant we held, as a matter of law, that the presumption of negligence had vanished and that there was nothing to submit to the jury.

The Supreme court took this case by certiorari and, holding that we were in error in reversing without remanding, reversed our judgment and remanded the cause to this court with directions either to affirm the judgment or to reverse it and remand the cause to the trial court for a new trial. (346 Ill.140.)

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IN THE COURT OF THE COMMONS OF THE UNITED KINGDOM OF GREAT BRITAIN

BEFORE THE LORDS OF THE APPEAL IN PARLIAMENT ASSEMBLED

THE LORDS OF THE APPEAL IN PARLIAMENT ASSEMBLED

RECOVER DAMAGES FOR LOSS OF EARNINGS IN CASE OF DEATH

APPEAL IN A CASE IN WHICH THE DEFENDANT'S DECEASED WAS

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Counsel for the respective parties have re-argued the case in this court. Based upon a statement in the Supreme court opinion that the whisky was in the joint custody of the government storekeeper and of the defendant, counsel for plaintiff argues that it follows that the defendant was responsible for the acts of the storekeeper; that it was its duty to watch his actions for the purpose of guarding against any loss to the stored goods through the negligence, intentional or otherwise, of the government storekeeper. Hence, plaintiff contends, as the record shows no evidence of such supervision by the defendant the judgment must be affirmed.

We do not understand that the Supreme court opinion goes this far. It does not hold that the proprietor is responsible for the negligent acts of the government storekeeper, especially with reference to the warehouse room over which the storekeeper has dominant control. The opinion evidently means that the defendant here cannot excuse his own negligence, if any, by invoking the federal regulations placing the whisky in the custody of the storekeeper, but that it will be held answerable for the results of its own negligence.

"The warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete and practically exclusive," and the proprietor of the warehouse "must forego the right even to enter his own building except by permission and in the presence of the storekeeper." In Re Miller Pure Rye Distilling Co., 176 Federal, 606.

Something was said in argument as to the absence of one of the valve wheels in the store room which controlled the pipe to the sprinkler system in the room. The evidence showed that when the firemen attempted to force water through this pipe so as

to operate the sprinkler system, they were unable to do so because the system was turned off at the point where the valve wheel was missing; but the firemen were pouring water into the room within a very few minutes after their arrival at the building and there is no evidence that if the system had been open the fire would have been retarded in any appreciable degree. The argument that, if the steam radiators in the room had been turned on it would have been unnecessary to turn off the sprinkler system, is based on conjecture. There is no evidence as to this.

The opinion of the Supreme court states that whether the defendant was justified in shutting off the water in the sprinkler system was a question of fact for the jury, yet, in the absence of any evidence as to any connection between this and the fire, we fail to see how it could be a material fact. There was no evidence in any definite terms as to what effect the shutting off of the sprinkler system had upon this particular fire, and no evidence whatever as to how much the damages would have been lessened, if at all, if the system had operated. "Liability can not rest upon imagination, speculation or conjecture." Petersen & Co. v. Industrial Board, 281 Ill. 326.

The argument that plaintiff contracted with reference to the presence of a sprinkler system seems to lose force when we consider that plaintiff was not free to store where he pleased but was compelled to store in the place designated by the government.

We cannot construe the opinion of the Supreme court as directing that we affirm the judgment. That court has held that we were in error in holding as a matter of law that there was no evidence tending to support the charges of negligence. The re-argument presents nothing which might cause us to alter our opinion as to the probative force of the evidence. If on the next trial the evidence is substantially the same as on the first, and the

to operate the sprinkler system, they were unable to do so because the system was turned off at the point where the valves were missing; but the firemen were pouring water into the tank within a very few minutes after their arrival at the building and there is no evidence that if the system had been open the fire would have been reduced in any appreciable degree. The argument that if the alarm bell in the room had been turned on it would have been unnecessary to turn off the sprinkler system, is based on conjecture. There is no evidence to that effect.

The defendant was justified in shutting off the water in the sprinkler system as a question of fact for the jury, yet, in the absence of any evidence as to any connection between this and the fire, we fail to see how it could be a material fact. There was no evidence in any definite form as to what effect the shutting off of the sprinkler system had upon this particular fire, and no evidence whatever as to how much the damage would have been increased, if at all, if the system had operated. "Reliability can not rest upon imagination, speculation or conjecture." Reference A Co. v. Industrial Board, 201 Ill. 380.

The argument that reliability is established by the testimony to the presence of a sprinkler system seems to lose force when we consider that reliability was not true to where there was a sprinkler system was compelled to state in the opinion delivered by the court. We cannot consider the opinion of the court as authority as directed that we affirm the judgment. That court was held that we were in error in holding as a matter of law that there was no evidence tending to support the charge of negligence. The argument presented nothing which might cause us to alter our opinion as to the probable force of the evidence. It on the other hand the evidence is substantially the same as on the first, and the

verdict should be for the plaintiff, the trial court on motion for a new trial should set this aside as against the weight of the evidence.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

viewed should be for the benefit of the public. The public interest is served by a law which shall not only be just but also be wise in its application.

The judgment is rendered and the court pronounces the law to be valid.

REASONING AND CONCLUSION

It is the duty of the court to apply the law to the facts of the case.

The court finds that the law is valid and applicable to the facts of the case.

The court concludes that the law is valid and applicable to the facts of the case.

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The court finds that the law is valid and applicable to the facts of the case.

The court concludes that the law is valid and applicable to the facts of the case.

35461

RICHARD G. SCHMID and WILLIAM
RYAN, Copartners, Doing Business
as SCHMID AND RYAN,
Appellees,

vs.

JOSEPH D. O'DONNELL,
Appellant.

75 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

264 I.A. 632'

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, bringing suit for a balance claimed to be due for services rendered as architects, upon trial had a verdict for \$1329.72. Defendant appeals from the judgment entered.

Defendant first argues that the verdict of the jury is contrary to the law and the evidence. Plaintiffs were employed by defendant to render services as architects in the construction of a three-story store and flat building erected by defendant in River Forest, Illinois. There is no dispute over the rate of compensation, which was to be 5%, and the services included the usual services of an architect, drawing of plans, specifications, letting of contracts and superintendence of construction. Defendant claims that he was damaged by the unjustifiable delay in the completion of the building and the consequent loss of the rents, and by the negligent and unskillful manner in which plaintiffs performed these services. Whether there was any delay for which the plaintiffs were accountable depends upon whether or not they had contracted that the building should be completed on a certain day.

Plaintiffs' version is that in May, 1926, Mr. Ryan, one of the plaintiffs, had a conversation with defendant looking towards the construction of a building, and pursuant thereto sent this letter:

RICHARD A. ROBERTS and WILLIAM
KIM, Co-Defendants, vs. ROBERTS and WILLIAM
as ROBERTS and WILLIAM

Defendants.

vs.

JOSEPH D. O'DONNELL,
Appellant.

COURT OF APPEALS

28414-14-13

IN THE COURT OF APPEALS OF THE STATE OF ILLINOIS

Plaintiffs, Responding Brief for a balance claimed in

of the for services rendered as architect, when trial had a

verdict for \$125,000. Defendant appeals from the judgment entered.

Defendant first argues that the verdict of the jury

is contrary to the law and the evidence. Plaintiffs were engaged

by defendant to render services as architects in the construction

of a three-story store and first building erected by defendant in

River Forest, Illinois. There is no dispute over the facts of

construction, which was to be 35, and the services rendered the

usual services of an architect, drawing of plans, specifications,

setting of contracts and superintendence of construction. Defendant

and claims that he was damaged by the unjustifiable delay in the

completion of the building and the consequent loss of the rental,

and by the negligent and wasteful manner in which plaintiffs

performed these services. Whether there was any delay for which

the plaintiffs were accountable depends upon whether or not they

had contracted that the building should be completed on a certain

day.

Plaintiffs' version is that in May, 1925, Mr. Ryan,

one of the plaintiffs, had a conversation with defendant looking

toward the construction of a building, and defendant thereupon sent

the following:

"May 3, 1926

Mr. Joseph O'Donnell:

Confirming our verbal proposition to you, the Architects' fee for your three-story Store and Flat Building in River Forest, Ill. will be five (5%) per cent, based on the total cost for all necessary Plans, Details, Specifications, letting of contracts, issuing of Certificates and Superintendence of construction.

R. G. Schmid & Co."

Defendant testified that he was an attorney at law and had known Mr. Ryan for twenty years; that in this preliminary talk defendant stressed the importance of having the proposed building completed with promptness; that Ryan agreed that it should be completed in the early days of April, 1927, so that it would be ready for renting by May 1. Ryan denies that he ever agreed to have the building completed by a certain day; says that he inserted a date for completing the work in the contracts between the defendant and the contractors, but that plaintiffs never agreed or guaranteed that the building should be completed by this date.

The respective versions of this conversation were submitted to the jury, which evidently accepted plaintiffs' story. It would be surprising if the architects should guarantee that the work would be completed by any certain date, for this would involve the guaranty of the performance by the contractors of their contracts. The building was completed the latter part of July or August, 1927. Without discussing the details it is sufficient to say that the jury was justified in finding that the plaintiffs were not responsible for the delays and that for the most part they were occasioned by conditions which were beyond the control of plaintiffs and which, in some instances, were especially provided for in the contractors' contracts.

Defendant complains that plaintiffs should have required the plastering contractor to apply three good coats of plaster on all wire lath in the building and failed to require

him to finish all walls and ceilings smooth, straight and even, and that plaintiff's allowed this contractor to do an inferior job on the walls and ceiling. The jury could properly find that this complaint was not justified; that there were three coats of plaster laid on in a workmanlike manner.

The entire building seems to have been properly constructed except in one particular. The specifications provided that the boiler should be placed in a pit to be 11 inches below the level of the basement floor, which pit should be "absolutely waterproof," with a floor drain connected with the sewer. There was abundance of evidence that it was not waterproof - that there were at times ten inches of water in the pit. The reason for this is that the sewer in the street is higher than the floor in the boiler pit, thus preventing drainage from the pit floor into the sewer. In an attempt to remedy this a drain was put in the side of the boiler pit about eight inches above its floor. It is obvious that this would not drain water from the pit below eight inches.

Mr. Hall, a qualified expert architect, testified that "the architect is to blame for not knowing that the sewer in the street is higher than the floor of the boiler pit. You can find that out by surveying or by excavating. Architects demand a survey showing the location of the sewer before they start a job.*** If the owner told me the sewer was low enough so that I could proceed I would proceed, but I would go on record in writing." Another witness, in the plumbing and heating business for a number of years, testified that to remedy the difficulty so as to drain the boiler pit it would be necessary to take the boiler off its foundation and move it to one side, raise it about eight inches, put a new floor in the pit and reset the boiler; that the reasonable cost for this would be \$500. We are of the opinion that in this respect plaintiff's were negligent. The evidence of the witness as

to the cost of the reconstruction necessary to put the pit in proper condition is not contradicted. We are of the opinion that this amount, \$500, should be charged against plaintiffs.

Defendant's counsel argue that there was a variance, as the declaration was on a written contract, whereas no written contract was introduced in evidence. The writing introduced in evidence was the letter sent by plaintiffs to defendant after their preliminary conversation. It confirms the verbal proposition made to defendant and states the architects' fee and the services to be performed. It is not claimed that the letter does not contain the agreement of the parties except as to defendant's assertion that plaintiffs had contracted to have the building completed by a certain date. It was not necessary for the defendant to sign this letter. When he accepted the services mentioned in the writing he signified his acceptance of its terms. There was no variance. See also Capital State Savings Bank v. Charles E. Larson et al., 255 Ill. App. 479, holding that in cases of the first class in the Municipal court the declaration need not state a cause of action with the same particularity as in other courts of record.

It is argued that there was error with reference to instructions given and improper remarks made by counsel for plaintiffs to the jury. While both these points have some merit, yet they are not sufficiently serious to justify a reversal. Defendant did not object specifically to the instructions.

We are of the opinion that upon the record plaintiffs are entitled to recover. It developed upon oral argument that the case has twice been tried, with a verdict for plaintiffs each time.

We hold that plaintiffs are entitled to their claim less \$500, the amount required to reconstruct the boiler pit. If, therefore, plaintiffs within ten days from this date will remit \$500 from the amount of the judgment it will be affirmed for \$829.72, otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR; OTHERWISE
REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

to the fact of the responsibility necessarily to put the bit in
proper condition is not contradicted. We are of the opinion that
this amount, \$200, would be sufficient to satisfy the claim.
Defendant's counsel argues that there was a violation
as the decision was on a written contract, which is stated
contract was introduced in evidence. The writing introduced in
evidence was the letter sent by plaintiff to defendant after their
preliminary conversation. It contains the verbal agreement made
in testimony and states the contract. It has been admitted as
evidence. It is not claimed that the letter does not contain the
agreement of the parties except as to defendant's assertion that
plaintiff had contracted to have the building completed by a cer-
tain date. It was not necessary for the defendant to sign this
letter. When he accepted the services furnished in the writing he
acknowledged his acceptance of the terms. There was no violation.
The United States District Court at St. Louis held in the case of
No. 47, holding that in cases of this kind where the contract
contains the decision need not state a cause of action with the same
particularity as in other cases of torts.

It is argued that there was error with reference to
instructions given and improper remarks made by counsel for plain-
tiff to the jury. While such remarks have some weight, yet
they are not sufficiently serious to justify a reversal. Defendant
did not object specifically to the instructions.

We are of the opinion that upon the record plaintiff's
case entitled to reversal. It developed from oral testimony that
there was never been trial with a verdict for plaintiff's case. This
we hold that plaintiff's case entitled to enter a new trial. The
amount awarded to defendant was \$200. If, therefore, plain-
tiff claims the right to a new trial we will grant it. The court
of the judgment is affirmed and costs \$100, awarded to still
be reversed and the case remanded.

REVEREND AND HONORABLE JUSTICES

COURT OF APPEALS

CONFIRMED AND RECORDED

RECEIVED AT ST. LOUIS, MO., MAY 10, 1906

35540

In Re: PETER VOISLOWSKY, Deceased,
TELFER MacARTHUR,
Appellant,

vs.

LOUIS ENGEL, Executor,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

264 I.A. 632²

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

This is a companion case to another of the same title, No. 35539, in which an opinion has been this day filed. Here the amount allowed by the Probate court to claimant was \$500. On appeal to the Circuit court, as in the other case, the claimant filed a special limited appearance and moved to dismiss the appeal on the ground that the bond was not approved and filed within 20 days of the allowance of the claim. This motion was denied. The record shows that thereafter the claimant introduced evidence and participated in the trial in the Circuit court. He thereby waived the irregularity in the filing of the appeal bond and submitted himself to the jurisdiction of the court. The evidence in this case is not before us, so we must assume that the judgment of the Circuit court against claimant was proper, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

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IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA
JULIUS ROSENBERG, Defendant,
vs.
UNITED STATES, Plaintiff.

BY COURT REPORTER

UNITED STATES, Plaintiff,
vs.
JULIUS ROSENBERG, Defendant.

Verdict.

364 1, 4, 6, 8, 10

THE JURY HAS REACHED ITS VERDICT AND FINDS THAT THE DEFENDANT IS GUILTY OF THE CHARGES AS SET FORTH IN THE INDICTMENT.

This is a criminal case in which the defendant is charged with the crime of conspiracy to defraud the United States. The evidence presented at the trial is sufficient to establish the guilt of the defendant beyond a reasonable doubt. The jury has heard the testimony of the witnesses and has considered the evidence in light of the law. The jury has reached its verdict and finds that the defendant is guilty of the crime charged. The jury's verdict is based on the evidence presented at the trial and is supported by the law. The jury's verdict is final and conclusive. The defendant is found guilty of the crime charged and is sentenced to the punishment provided by law.

VERDICT.

Verdict, 1, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, 72, 74, 76, 78, 80, 82, 84, 86, 88, 90, 92, 94, 96, 98, 100.

35564

YOUNG, LORISH & RICHARDSON,
a Corporation,

Appellee,

vs.

NEWELL MCCARTNEY,

Appellant.

78 A
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 632³

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$95.85 entered upon a trial by the court of an action wherein plaintiff brought suit for a balance alleged to be due on a contract for the purchase of a radio. The statement of claim alleged that the contract was made with defendant by the Hankel Radio Company, dated September 3, 1929, and duly assigned by the Hankel Radio Company to plaintiff on September 6, 1929. Plaintiff does not appear in this court to defend the judgment.

The judgment must be reversed for the reason that the evidence does not support the averments that the contract was assigned to plaintiff.

The contract of sale was between the Hankel Radio Company and the defendant, and provided for the purchase of a radio and payments in installments; it is dated September 3, 1929; on the reverse side is a form of assignment dated September 6, 1929, wherein it recites that for value received "the undersigned" sells, assigns and transfers to (blank) the within contract. It purports to be signed "Hankel Radio Co. (Seal) (Dealer) by J. R. Edwards." What connection Edwards had with the Hankel Radio Company does not appear.

A witness for the plaintiff testified that plaintiff was a distributor of radios; that Heller & Company, "the finance company," gave the net amount of the contract to Hankel Radio

50004

ROGER, LOUIS & COMPANY,
a Corporation

Residence

VS.

WILLIAM W. WILSON,
Respondent

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$22.25 entered upon a trial by the court of an action wherein plaintiff sought relief for a balance alleged to be due on a contract for the purchase of a radio. The statement of claim alleged that the contract was made with defendant by the plaintiff, William W. Wilson, on September 6, 1930, and that plaintiff does not dispute in this court its validity. The judgment was for the plaintiff. The judgment must be reversed for the reason that the evidence does not support the averments that the contract was assigned to plaintiff. The contract of sale was between the Daniel Radio Company and the defendant, and provided for the purchase of a radio and payments in installments; it is dated September 6, 1930; on the reverse side is a form of assignment dated September 6, 1930, wherein it recites that the value received "the undersigned" sold, assigned and transferred to (plaintiff) the within contract. It purports to be signed "Daniel Radio Co. (Sole)" (Signed by J. A. Edwards). That connection Edwards has with the Daniel Radio Company does not appear. A witness for the plaintiff testified that plaintiff was a distributor of radios; that he sold a company, "The Finance Company," gave the net amount of the contract to Daniel Radio

Company and the contract was turned over to Heller & Company who apparently retained possession of it until about July 28, 1930. No assignment from Heller & Company appears to have been made. The only evidence as to how plaintiff became the assignee of the contract is the bald statement of this witness that she received the contract from the Hankel Radio Company.

Section 18 of chapter 110, Practice act, provides that the assignee and bona fide owner of any chose in action may sue thereon in his own name, but shall by affidavit allege that he is the actual and bona fide owner thereof, and set forth how and when he acquired title.

There was an absence of any evidence as to how plaintiff became the assignee of the contract. Rather, the evidence shows that it had been assigned to Heller & Company, who retained possession of it for almost a year after the date on which plaintiff alleged in its statement of claim that it had become the owner by assignment.

Because of the failure of the plaintiff to prove its right to bring suit, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

35704

O. A. CHRISTENSEN, as trustee,
Appellee,

v.

AMELIA SEVERIN et al.,
Appellants.

797
INTERLOCUTORY APPEAL
FROM CIRCUIT COURT, COOK
COUNTY.

264 I.A. 632

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order appointing a receiver in a foreclosure proceeding. In addition to the bill of complaint, a special verified petition was filed on the motion for appointment of a receiver.

The bill alleged that the trust deed was given to secure an indebtedness of \$50,000; that the semi-annual interest due April 16, 1931, was unpaid; that certain bonds aggregating \$2000, falling due April 16, 1930, are unpaid, except that \$500 has been paid thereon; that since the filing of the bill on October 16, 1931, another installment of semi-annual interest and \$2000 of principal is due and unpaid. The petition set forth in detail a description of the building conveyed as security and the gross rental and a detailed account of the managing expenses. It also showed that after the expenses for operating were deducted from the gross rental there would be left \$3248, while the interest charges alone were \$3000 a year and the prepayments on account of principal, \$2000 a year; that the valuation of the entire premises was not more than \$40,000 and the mortgage debt was \$50,000; that the mortgagor was behind more than \$5000 in principal and interest payments when the bill was filed. The order recites that in accordance with the prayer

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U.S. DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY

43

side is Martin Luther
Lutherburg.

Zusatz: ☐ **Entschuldigend**

DATE RECEIVED

200 A. I. 455

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

This is an industrial agency from an order originating in a technical procedure. In addition to the bill to establish a special technical system for the use of the agency of the technical.

The bill stipulates that the report must be submitted to the President of the Senate and the President of the House of Representatives at 100,000,000. The bill also provides that the report must be submitted to the President of the Senate and the President of the House of Representatives at 100,000,000. The bill also provides that the report must be submitted to the President of the Senate and the President of the House of Representatives at 100,000,000.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

[illegible]

of the bill the receiver should be appointed.

The first point made by the defendants is that the bill of complaint must allege facts and must be properly verified. The allegation as to the property being inadequate security was supported by the facts set up in detail in the petition. These clearly show that the property was inadequate security for the mortgage debt.

The bill was properly verified. It is not open to the objection made in any of the cases cited by the defendants, as an examination of those cases will disclose.

It is next said that the provisions in the trust deed for the appointment of a receiver upon filing of bill to foreclose is not controlling upon a court of equity, citing Frank v. Siegel, 263 Ill. App. 316. There is no dispute as to this proposition, but the instant receiver was not appointed by virtue of the provisions of the trust deed alone but by the showing that the premises conveyed was scant and inadequate security.

The last point made is that the petition does not pray for the appointment of a receiver and is merely a paper or motion. The cases cited in support of this proposition involve an entirely different situation and are not in point. The bill asked for the appointment of a receiver and, as we held in the recent case of North American Trust Co. v. Parker et al., opinion number 35613, filed in this court January 4, 1932, it is the proper practice "to file a petition setting up supplementary and specific facts which would justify the appointment of a receiver."

The points made in the defendants' brief present no sufficient reason for reversing the order appointing a receiver and it is therefore affirmed.

APPROVED.

O'Connor, P. J., and Hatchett, J., concur.

of the bill the receiver should be appointed.

The first point made by the defendant is that the bill

of complaint must allege facts and must be properly verified. The

allegation as to the property being inadequately secured was supported

by the facts set up in detail in the petition. There is clearly shown

that the property was inadequately secured for the mortgage debt.

The bill was properly verified. It is not open to the

objection made in one of the causes cited by the defendant, as an

examination of those causes will disclose.

It is now said that the provisions in the fourth and fifth

the appointment of a receiver upon filing of bill in rem are in

contradiction upon a point of fact. It is stated that the

bill says that the property is in the hands of the receiver and the

bill further says that the property is not in the hands of the receiver and the

bill further says that the property is in the hands of the receiver and the

bill further says that the property is in the hands of the receiver.

The last point made is that the petition does not properly

set the appointment of a receiver and is merely a paper on which

The cause cited in support of this proposition is that the

bill says that the property is in the hands of the receiver and the

bill further says that the property is not in the hands of the receiver and the

bill further says that the property is in the hands of the receiver and the

bill further says that the property is in the hands of the receiver and the

would justify the appointment of a receiver.

The points made in the defendant's brief present no

objection to the appointment of a receiver upon filing of bill in rem.

It is further stated

that the bill is properly verified.

35340

METROPOLITAN PAVING CO.,
Appellee,

vs.

ALEX SCHMIDT,
Appellant.

807
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 632⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for a sum alleged to be due for paving an alley and constructing a sewer adjacent to premises described as "Lots 10, 12, 13, 14 and 15 in Block 53 in S. E. Gross' Third addition to Dauphin Park ** otherwise known as 623, 629, 631 and 635 East 92nd Street, in the City of Chicago." It was alleged in the statement of claim that the work was done at the special instance and request of defendant and "in accordance with terms of a certain agreement in writing" signed by him; that the work was completed on or about October 24, 1928, and accepted by the Board of Improvements of the City of Chicago. In his affidavit of merits defendant denied that he was the owner of the property or the premises improved or that he entered into the contract and denied that he authorized plaintiff to do the work or that he represented to plaintiff that he was the owner.

There was a trial by jury, a verdict for plaintiff in the sum of \$673.75, motions by defendant for a new trial and in arrest of judgment, which were overruled, and judgment on the verdict, which defendant asks this court to reverse.

Upon the trial plaintiff produced a written contract filled out in longhand on a printed form. The contract contains a proposal by plaintiff to do the work of paving the alley bounded by 92nd street, 92nd place, Langley and St. Lawrence avenues, with specifications as to price, etc. At the end of the proposal appears

RECEIVED BY THE
OFFICE OF THE
ATTORNEY GENERAL

APPROVED
BY THE
ATTORNEY GENERAL

THE CHIEF

2541.4.022

MR. JUSTICE HARTWELL BELMONT THE ATTORNEY GENERAL

Witnessed and sworn to by a notary public in the

City of New York and containing a correct statement of the

contents of the same in, to, by, and for the said

person, this instrument is hereby acknowledged to be

the act and deed of the said person, in the City of New York, in

the presence of the undersigned, who were duly sworn to

the special instance and request of the said person and in accordance

with the provisions of the laws of the State of New York; that

the said person is a resident of the City of New York, and

the said person is a resident of the City of New York, and

the said person is a resident of the City of New York, and

the said person is a resident of the City of New York, and

the said person is a resident of the City of New York, and

the said person is a resident of the City of New York, and

the said person is a resident of the City of New York, and

There was a trial by jury, a verdict for plaintiff in

the sum of \$100,000, which was returned by the jury and is

correctly stated, and the same is hereby acknowledged to be

correctly stated, and the same is hereby acknowledged to be

When the said plaintiff produced a written contract

the said contract was produced in a proper form. The plaintiff

produced the said contract in the City of New York, and

the said contract was produced in the City of New York, and

the said contract was produced in the City of New York, and

At the end of the present contract

the following in print:

"We, the undersigned, owners or agents of property abutting on the aforesaid alley, hereby accept the foregoing proposal and agree to pay for said work at the office of the Metropolitan Improvement Company, 160 No. LaSalle Street, Chicago, when the work is completed, according to terms on face of contract."

Following this and written in the appropriate blanks are names of the owners and acceptors, dates of signatures and places of residence by street number. The name, "Alex Schmitt" appears on the seventeenth line of this list. His residence is stated opposite his name to be "603 E. 90th St." and on the line underneath, following the word "date" appears the numbers "12, 13, 14, 15" and "Lot No. 10." On line 21 appears the following:

"Name: Alex Schmitt. Residence, 623 E. 92nd St.
Date.....10.....Lot No. 10. Street No....."

Mr. Bishop testifying for plaintiff stated that defendant signed the contract on both lines 17 and 21; that he (the witness) secured these signatures - the one on line 17 on March 25, 1916, and the other about three or four days later; that the numerals 12, 13, 14 and 15 underneath line 17 were written in by defendant. He also testified that he thought "Lot No. 10" underneath the signature on line 21 was also written by defendant. On cross-examination he testified positively that defendant wrote the numbers 12, 13, 14 and 15 after his signature on line 17 and that he also signed on line 21.

Defendant testified that he signed on line 17 but that the numerals 12, 13, 14 and 15 were not in the contract at the time he signed; that the same were not in his handwriting and that he did not write the lot numbers there. He testified positively that the signature on line 21 was not his signature at all, and further that he never owned lots 12, 13, 14 and 15. He said that he signed on line 17 for paving to be done at 603 East 90th street which, as a matter of fact, was never done and was not covered by the contract;

THE FOLLOWING IS WRITTEN

On the 15th day of May, 1934, the undersigned, Walter J. ...
as the undersigned, hereby accept the foregoing ...
and to pay for said work at the office of the undersigned ...
at ...
is hereby ...

Following this and written in the appropriate places are names of
the owners and operators, dates of assignments and places of work
done by each person. The name, "Alvin Karpis" appears on the
seventeenth line of this list. The assignment is dated ...
his name to be "000 8-2000 8-7" and on the line underneath, "1-1-
1934" the word "date" appears the numbers "11, 12, 13, 14" and
"15, 16, 17, 18, 19, 20" are written in the following:

Name: Alvin Karpis, 000 8-2000 8-7
Date: 1-1-1934

Mr. Karpis testifies that Karpis stated that before
signed the contract on both lines 17 and 18; that he (Mr. Karpis)
assumed these assignments - the one on line 17 on March 12, 1934, and
the other about three or four days later; that two months 12, 13,
14 and 15 underneath line 17 were written in by Karpis. He also
testified that he thought "1-1-1934" underneath the signature on
line 18 was also written by defendant. On cross-examination he tes-
tified positively that defendant wrote the numbers 12, 13, 14 and 15
after his signature on line 17 and that he also signed on line 18.
Defendant testified that he signed on line 17 but that
the numbers 12, 13, 14 and 15 were not in the contract at the time
he signed; that the same were not in his handwriting and that he
did not write the last numbers there. He testified positively that
the signature on line 18 was not his signature as well, and further
that he never owned lines 12, 13, 14 and 15. He said that he signed
on line 17 not having to be paid at that time for which, as
a matter of fact, was never done and was not covered by the contract.

that he never saw Bishop; that he signed on a Sunday morning (instead of in the evening as Bishop testified); that he never owned lots 12, 13, 14 and 15; but that his wife owned them in 1924. Evidence was offered tending to show that Mrs. Schmidt, wife of defendant, contracted to sell these lots prior to the time that it was alleged the paving contract was executed. Plaintiff offered evidence which it is argued showed the contrary.

Defendant contends that the verdict is contrary to the evidence in the case. We do not deem it necessary to pass on that question. There was an issue of fact for the jury as to whether defendant executed the contract for the improvements to be made adjacent to these lots, and defendant was entitled to have that issue of fact fairly submitted to the jury.

In the course of his argument to the jury the attorney for plaintiff stated, "Schmidt admitted that he signed the two contracts." Defendant objected and asked the court to instruct the jury to disregard the statement. The objection was overruled.

It is the theory of defendant (and evidence was offered tending to show) that defendant did not own the real estate to be improved at the time the alleged contract was made, and further, that while his wife, Mrs. Schmidt, had at one time owned these lots she had prior to the alleged execution of this contract for the improvement entered into contracts by which she had agreed to convey them to other persons.

It would be improbable that one who did not own the real estate or one who, holding the title, was already under a valid contract to convey it, would enter into a contract to pay the expense of improving it. The attorney for defendant undertook to present this argument to the jury, but the attorney for plaintiff objected on the ground, as he said, "We are not bound by any contracts or agreements made between Mr. Schmidt and the purchasers of

that he never saw him; that he signed on a January morning (in-
stead of in the evening as witness testified); that he never came
before 12, 13, 14 and 15; but that his wife came there in 1934.
Witness was visited weekly in New York City, New York, after he
returned, according to all known facts after he had been
it was alleged the witness returned and resided. Witness's wife
witnessed that he is always around the country.

Witness also testified that the verdict is contrary to the
evidence in the case. He has been in the country for years and
question. There was an issue at trial for the jury as to whether
Belmont executed the contract for the improvement to be made in
tangent to these facts, and defendant was entitled to have that issue
of fact fairly submitted to the jury.

In the course of his argument to the jury the attorney
for plaintiff stated, "Defendant admitted that he signed the two con-
tracts." Defendant objected and asked the court to instruct the
jury to disregard the statement. The objection was overruled.
It is the duty of defendant to call evidence and object.

Called to show that defendant did not own the real estate in the
interest at the time the alleged contract was made, and further,
that while his wife, Mrs. Schmidt, had at one time owned these facts
she had prior to the alleged execution of this contract for the
improvement entered into contracts of sale and had entered in convey-
ance in other states.

It would be inadvisable that one who did not own the
real estate at one time, selling the title, was entitled under a valid
contract to convey it, would enter into a contract to pay the ex-
pense of improving it. The attorney for defendant submitted to
the jury this argument in the last, but was refused the plaintiff
objected on the ground, as he said, "We are not bound by any con-
tract or agreement made between Mr. Schmidt and the purchasers of

any of these lots." The court sustained the objection, saying, "It would not bind the plaintiff in this case." The attorney for plaintiff then told the jury in substance that the original agreements which were in evidence and were recorded, were notice to all the world that Mrs. Schmidt had sold the lots to different persons, and that she had rights in them only as a vendor. The court replied, "Even if what you say is true, it would not be binding upon the plaintiff, Metropolitan Paving Co.," and the defendant took an exception. Again, attorney for defendant argued to the jury that defendant never had title and would have no interest in having the alleys paved. The court said: "I do not agree with you. If he signed the contract he is liable to pay even if he never had any interest in these lots." Again, attorney for defendant stated that the burden was upon plaintiff to prove his case by a preponderance or greater weight of the evidence. Plaintiff's attorney objected, and the court sustained the objection. Attorney for defendant then went on to argue that if the jury believed a witness had testified falsely as to any material fact, the jury had the right to disregard the entire testimony of the witness except as corroborated, but attorney for plaintiff objected and the objection was sustained by the court.

Other instances might be recited, but enough has been stated to show that by its rulings for plaintiff and against defendant and statements made in its presence, the court disclosed to the jury an opinion in favor of plaintiff upon the facts which made it quite impossible for defendant to have an impartial trial of the issues. Skelly v. Boland, 78 Ill. 438; Andreas v. Ketchum, 77 Ill. 377; Chicago City Ry. Co. v. Cooney, 95 Ill. App. 471.

The jury was instructed orally. The court stated that it was for the jury "to say from the evidence as to what the intentions were at the time the contracts were signed by the defendant

[illegible]

Alex Schmidt." An issue of fact in the case was whether both these contracts were signed by Schmidt, and the instruction of the court assuming that Schmidt had signed both clearly took that issue from the jury. Defendant requested the court to instruct the jury that the burden of proving the case was upon plaintiff; that plaintiff must prove its case by a preponderance or greater weight of the evidence, and that if it failed to do so or if the evidence preponderated in favor of defendant, or if it were evenly balanced, then the jury should bring in a verdict in favor of defendant. The court refused to give this instruction, and it was not covered by any other instruction given. The instruction is a stock instruction, and we think it was error on the part of the court to refuse it.

For the errors indicated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, F. J., and McSurely, J., concur.

also testified, on issue of fact in the case for which these
contracts were signed by defendant, and the instruction of the court
assuming that defendant had signed both checks that issue from
the bank. Defendant presented the money to interest the jury that
the burden of proving the case was upon plaintiff; that plaintiff
must prove the case by a preponderance of greater weight of the
evidence, and that if it failed to do so it was evidence pro-
duced in favor of defendant, or if it was evenly balanced,
then the jury should find in favor of defendant.
The court refused to give this instruction, and it was not correct
by any means instruction given. The instruction is a stock in-
struction, and we believe it was error on the part of the court to
refuse it.

Now the court indicated the judgment is reversed and
the case remanded for a new trial.

REVEREND AND HONORABLE

Witness my hand and seal this 1st day of January, 1900.

35393

In Re: ESTATE OF HARRY V. FINKELSTEIN,
Deceased.

SOL H. GOLDBERG, Claimant Below,
Appellant,

vs.

LEONORE FINKELSTEIN, as Executrix of
Estate of Harry V. Finkelstein, Deceased.
Appellee.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

264 I.A. 633'

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

On November 25, 1929, Sol Goldberg filed in the Probate court of Cook county his amended claim against the Estate of Finkelstein in the sum of \$3245.86. The claim is based upon two items:

(1) a judgment which was entered in favor of claimant in the Municipal court of Chicago on October 27, 1914, with interest and costs;
(2) a note of the deceased to the order of claimant in the sum of \$1500, dated May 3, 1912, due sixty days after date, with interest at six per cent.

The Probate court allowed the first item to be paid out of assets not inventoried within one year from the issuance of letters and disallowed the second item. On appeal to the Circuit court and on a trial de novo the first item was allowed in the sum of \$930.16 and the second item was again disallowed. The claimant has appealed from the order disallowing the second item based on the note, and the executrix has appealed from the order allowing the first item based on the judgment.

The executrix contends with reference to item one that since the claim was not filed within one year from the granting of letters, but was filed after the expiration of the term fixed by her for filing claims, its payment should have been (quando acciderint) limited to assets or property of the estate which had not already been inventoried or accounted for. (See Smith-Ward's

IN RE: ESTATE OF JAMES V. HILL
Deceased

ALL OF THE ABOVE, DECEASED, BEING
RESPONDENTS.

STATE OF NEW YORK
COUNTY OF COLUMBIA

LEONARD H. HILL, JR., as executor of
the estate of JAMES V. HILL, deceased,
Respondent.

1. JAMES V. HILL, DECEASED, WAS THE OWNER OF THE ESTATE.

On November 22, 1904, said defendant filed in the Probate
Court of Cook County his amended claim against the estate of James
V. Hill in the sum of \$2000.00. The claim is based upon two items:
(1) a judgment which was entered in favor of defendant in the year
1901, and (2) a note of the deceased to the order of defendant in the sum of
\$1000, dated May 3, 1912, due sixty days after date, with interest
at six per cent.

The Probate Court allowed the first item to be paid
out of assets not inventoried within one year from the issuance of
letters and disallowed the second item. On appeal to the Circuit
Court and on a writ of Habeas Corpus the first item was allowed in the
sum of \$2000.00 and the second item was again disallowed. The claimant
and has appealed from the order disallowing the second item based
on the note, and the executor has appealed from the order allowing
the first item based on the judgment.

The executor contends with reference to item one that
when the claim was filed with him he had been informed by
letters, but was filed after the expiration of the term fixed by
law for filing claims, and because of this fact he was
not already been inventoried or administered to.

Illinois Statutes, 1929, chapter 3, section 70, page 89.) Such would seem to be the proper construction of the statute. (Darling v. McDonald, 101 Ill. 370.)

The defense interposed as to the second item is that the note was barred by the statute of limitations. As the note was dated May 3, 1912, and due by its terms sixty days after date and was first exhibited as a claim in the Probate court in December, 1924, it was prima facie barred by the statute. However, upon the hearing claimant undertook to overcome this by showing that on March 1, 1917, the deceased made a payment of \$100 on the note. If the payment was in fact made, this would remove the bar of the statute. Howles v. Beator, 47 Ill. App. 98; Lathrop v. Carroll, 188 Ill. App. 653. There was no payment endorsed upon the note and no such credit was allowed or set forth in the original claim or in the affidavit attached thereto. The former attorney for the claimant testified that about the first part of March, 1917, he met Mr. Finkelstein, the testator, and that they went to lunch together; that the testator asked, "Where is Sol?" (meaning complainant), to which the attorney replied that Sol could not come but that he had come in Sol's place; that Mr. Finkelstein then said, "I wanted to talk to Sol and pay him some money;" that he, the attorney, then said, "I will take it," and that Mr. Finkelstein then gave him \$100 to apply on the note, and on the same afternoon he turned it over to claimant. On cross-examination this witness admitted that he did not at the time in question have the note in his possession; that he did not endorse the payment on the note; that he did not make any written memorandum of the date or amount of payment at the time; that he did not give the matter any particular consideration or thought between March, 1917, and February, 1926. He says he

Illinois Statutes, 1917, Chapter 1, Section 17, that the
 would soon be the proper completion of the statute. (Illinois
 Statutes, 1917, Chapter 1, Section 17.)

The defense introduced as to the second time in that
 the note was passed by the statute of limitations. As the note
 was dated May 3, 1918, and was by the same party after date
 and was first exhibited as a claim in the Federal court in Decem-
 ber, 1924, it was held inadmissible by the statute. However,
 upon the hearing plaintiff introduced as evidence that in showing
 that on March 1, 1917, the defendant made a payment of \$100 on the
 note. It was argued that the note was not paid until the 1st
 of the estate. However, the defense introduced evidence
 that on March 1, 1917, the defendant made a payment of \$100 on the
 note and was not until the 1st of the estate. The defense
 argued that the claim was not until the 1st of the estate. The
 attorney for the defendant testified that about the 1st of
 March, 1917, he met Mr. Hirscheim, the defendant, and that they
 went to lunch together; that the defendant asked, "where is the
 (defendant's name)? Is there any money in the bank?"
 would not come but that he had come in for a while; that he
 Hirscheim then said, "I wanted to talk to you and pay you some
 money," that he, the attorney, then said, "I will take it," and
 that Mr. Hirscheim then gave him \$100 in cash in the bank,
 and on the same afternoon he turned it over to plaintiff. On
 cross-examination this witness admitted that he did not at the time
 he testified have the note in his possession; that he did not
 receive the payment on the note; that he did not come any
 written acknowledgment of the debt or amount of payment at the time;
 that he did not give the parties any particular consideration or
 thought between March, 1917, and February, 1924. He says he

did not give Mr. Finkelstein any memo. of the amount of the payment; that he knew claimant had the note in his possession but did not suggest to him at the time of giving him the \$100 that he should endorse the payment on the back of the note; that the judgment in favor of claimant and against Mr. Finkelstein had been obtained before this \$100 payment had been made, but the witness did not remember whether anything was said about applying that amount on the judgment. Cross-examined, he said, "I am trying to recollect."

The claimant offered in evidence a letter from the deceased to claimant dated February 16, 1917, in which the deceased in substance said to claimant, in reply to a communication from him on February 13th, that the deceased would be in town practically every day and would arrange to call up by 'phone and that they might have a little lunch together, the letter adding, "this was a very unpleasant transaction to both of us."

It is apparent that the trial court did not accept the evidence submitted as sufficient to establish a payment which would remove the bar of the statute of limitations. The evidence is, under all the circumstances, inherently improbable, and upon review this court is not able to say that the finding of the trial court in this respect is against the manifest weight of the evidence. Our conclusion on this point is controlling and decisive. The executrix, however, also contends that even assuming that deceased made the supposed payment, this item of the claim was nevertheless barred by the statute because the appearance filed for her on December 3, 1924, was unauthorized and invalid and because the mere filing of the claim against the estate without the issuance of summons and service would not arrest the running of the statute of limitations. Reitzell v. Miller, 25 Ill. 37; Hales v. Holland, 92 Ill. 494; Vinkniakki v. Bleakley, 38 Ill.App.61

all not give Mr. Thompson any more. It was stated at the time
that he knew claimant had the wife in his possession and
did not suggest to him at the time of giving him the claim that
he should endorse the payment on the back of the note; that the
claimant in favor of claimant and against Mr. Thompson had
been obtained before this claim payment had been made, but was
with him at the time of payment and was with him when
that money was the claimant. Thompson said he did not
try to negotiate.

The claimant offered in evidence a letter from the
claimant to claimant dated February 18, 1917. In which the de-
ceased in substance said to claimant, in reply to a communication
from him on February 15, 1917, that the payment would be in time
eventually every day and would attempt to call on by phone and
that they might have a little lunch together, the latter adding,
"this was a very unpleasant transaction to get at."

It is apparent that the trial court did not accept
the evidence submitted as sufficient to establish a payment which
would remove the bar of the statute of limitations. The evidence
is, under all the circumstances, insufficient to remove the bar.
Review this court is not able to say that the finding of the
trial court in this respect is against the weight of the
evidence. The consideration on this point is controlling and de-
cides. The exception, however, also contains that even assuming
that deceased made the supposed payment, this item of the claim
was discharged by the statute against the claimant.
Filed for her on December 3, 1914, was introduced and showed
and because the same filing of the claim against the estate of
the deceased at the time of her death and before the statute
of the statute of limitations. The statute of limitations, in this case,
expired on December 3, 1914, and Thompson's claim was filed.

The record shows that Finkelstein died February 12, 1924, and that on May 19th thereafter his widow was appointed the executrix of his estate. On December 3, 1924, which was after the term fixed by the executrix for filing claims, this claim against the estate was first filed in the Probate court. No summons was issued, but on the reverse side of the claim so filed the then attorneys for the estate entered the appearance of the executrix and the claim was placed on the docket of the Probate court. The amount of the claim then filed was \$3507.50, of which \$2632.50 was based on the promissory note and \$875 was based on an alleged open account for a loan of \$800 as evidenced by a check. At the time of the filing of the claim the only property inventoried was valued at \$100, and the estate was considered practically worthless. On January 12, 1925, the Probate court allowed the claim for the full amount of \$3507.50. Subsequently an amended inventory was filed showing additional assets amounting to about \$35,000.

On February 9, 1928, about three years after the claim had been allowed, the executrix through another attorney filed her petition to set aside the order allowing the claim. In this petition she alleged that the claimant had imposed upon the court by claiming that the deceased had lived outside of Illinois for some years prior to his death, thereby telling the statute of limitations; that she had no knowledge of the filing or of the allowance of the claim; that decedent as a matter of fact had been a resident of Illinois for 34 years immediately preceding his death; that the statute of limitations had run against the claim, and that at the time of its allowance practically the entire estate was involved in litigation, but that since that time she had recovered a judgment in favor of the estate; that its assets therefore amount to about \$35,000. The petition prayed that the judgment allowing the claim be vacated and the same set for hearing.

Mr. Goldberg, the claimant, answered the petition denying the allegations of fraud and denying that the claim was barred by the statute of limitations and denying that Mr. Finkelstein had at any time been a resident of this State.

On June 18, 1929, the executrix filed an amended petition in which she averred that she had never authorized the attorneys for the estate to enter her appearance and to waive process and summons in the matter of the claim; that she had no notice or knowledge that the claim would be presented for allowance in January, 1925, or at any other time; that the court was without jurisdiction to allow the claim; that the action of the court in that respect was wholly void and of no legal effect, and that the allowance of the claim should therefore be set aside. There was a hearing upon this petition, and the order allowing the claim was set aside and the executrix was allowed to defend in behalf of the estate. On November 25, 1929, the amended claim was filed as heretofore set forth.

The claimant contends that when the executrix filed her petition on February 9, 1928, it amounted to ^a general appearance; that this appearance validated the voidable appearance which had theretofore been entered by her attorneys for her, and that having generally appeared she could not by an amended petition withdraw the jurisdiction which she had thus conferred; that this general appearance related back to the entry of appearance by her attorneys on December 3, 1924; that the statute had not run when the claim was filed on that date, and that it had not run when the appearance of the executrix was filed by her attorneys; that the subsequent ratification by her of their appearance for her took effect as of the date they first appeared and not on the date of her ratification thereof, and that for this reason the claim is not barred. The claimant does not cite any authority sustaining

Mr. Williams, the defendant, testified that the plaintiff
keeping the allegations of fraud and forgery that the claim was
settled by the plaintiff's attorney and that the claim was
settled and at any time from a review of this case.
On June 18, 1930, the executive filed an amended peti-
tion in which she averred that she had never acknowledged the return
for the estate to which was reported and to which plaintiff was
summons in the matter of the estate; that she had no notice or
knowledge that the claim would be presented for allowance in
January, 1930, or at any other time; that the court was without
jurisdiction to allow the claim; that the action of the court in
that respect was wholly void and of no legal effect, and that the
allowance of the claim should therefore be set aside. There was
a hearing upon this petition, and the order allowing the claim was
set aside and the executor was allowed to defend in behalf of the
estate. In December 22, 1930, the amended claim was filed as
petition and order.

The plaintiff testified that she was advised by her
lawyer on February 6, 1930, that the executor had received notice
that this application contained the plaintiff's application with
and that the executor had been advised by her attorney that she, the
plaintiff, should be advised and would not be permitted to bring
with her the jurisdiction which she had then submitted; that this
general statement related back to the entry of appearance by her
attorney on November 2, 1929; that the executor had not then when
the claim was filed on that date, and that it had not then when
the appearance of the executor was filed by her attorney; that
the executor's application by her at that time was for her look
after as of the date they first appeared and not on the date of
her petition thereat, and that the claim was filed in
and returned. The plaintiff then did not actually executing

his contention, and the executrix contends that Thompson v. Patek, 235 Ill. 341, is directly to the contrary. In that case certain defendants made a motion to vacate a judgment on the ground that there was no service of process and that the attorneys who entered their appearance were without authority to do so. The judgment was vacated. It was afterwards urged upon appeal that these defendants by filing a general appearance and asking for a vacation of the judgment on other than purely jurisdictional grounds had validated the judgment, and the general rule was invoked that a party questioning the jurisdiction must confine his motion to that specific purpose, otherwise he waives jurisdictional defects.

The court there said that the rule did not apply for the reason that the defendants did not ask the court to do anything except to vacate the judgment. Here, the executrix did ask for a trial on the merits, and we do not doubt that by so doing she would thereafter be estopped to deny the jurisdiction of the court, but this would not mean that she might not deny the former unauthorized appearance. She could not reasonably be held by her later appearance to have validated this prior one which she specifically disaffirmed in her amended petition. It would be absurd to so hold. The jurisdiction of the court over her so far as this claim is concerned must be held to date from the time of the authorized appearance on February 9, 1923, not the appearance of December 3, 1924, which was unauthorized and which it was the purpose of her petition to disavow. But on February 9, 1923, even assuming the alleged payment on March 1, 1917, the claim was barred by the statute and the Probate court of Cook county was without power to allow it. Yapple v. Mahy, 241 Ill. App. 446; In Re Estate of Mertz, 246 Ill. App. 263. It will be remembered there are no written pleadings required in the Probate court. A written plea of the statute of limitations is not necessary in that court in order to

[illegible]

preserve that defense. Smith v. Smith, 206 Ill. App. 239.

Therefore, even if we assume that the payment of \$100 was made on the note on March 1, 1917, this item of the amended claim must be considered as barred by the statute.

The judgment of the Circuit court disallowing the claim based on the note will be affirmed, and as to the item of the claim based on the judgment of the Municipal court, that judgment will be reversed and the cause remanded, with directions to allow the same to be paid out of the assets or property belonging to the estate which had not been already inventoried or accounted for by the executrix at the time of the filing of the amended claim.

AFFIRMED IN PART AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

THESE ARE THE RESULTS OF THE INVESTIGATION.

THE RESULTS OF THE INVESTIGATION ARE AS FOLLOWS:

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35439

MANDEL BROTHERS, INC.,
a Corporation,

Appellee

vs.

WALTER DREIS,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 633²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action based solely on a stated account and upon trial by jury there was a verdict for plaintiff in the sum of \$1221.62, upon which the court, overruling motions for a new trial and in arrest, entered judgment.

It is contended for reversal that a motion made by defendant at the close of all the evidence for an instructed verdict in his favor should have been granted as there was no competent evidence tending to prove an account stated, or if there was such evidence then it is said the verdict returned should have been set aside as clearly and manifestly against the weight of the evidence. These contentions require a review of the facts which the jury might have believed to be true and which seem to be as follows:

On August 7, 1929, Mrs. Dreis, wife of defendant, opened an account with plaintiff in the name of her husband. The wife and daughters of defendant thereafter purchased various items of merchandise upon this account. In October, 1929, the assistant credit manager of plaintiff talked with defendant on the 'phone and told him that his account was getting quite large. Defendant said he would send a check, not for the full amount but for a substantial part of it. The amount of the account at that time was \$651.78 and this was at that time particularly called to defendant's attention. Two or three days later plaintiff received a check for \$200 on the account. Whether the check was that of the defendant husband or

WILLIAM H. HARRIS, JR.,
 a corporation,
 Plaintiff,
 vs.
 JAMES HARRIS,
 Defendant.

28452 A.A. 033

IN SENATE, JANUARY 1, 1933.

It is requested that a motion be made by
 defendant at the close of all the evidence for an instructed ver-
 dict in his favor should have been granted as there was no compe-
 tent evidence tending to prove an act and stated, or if there was
 such evidence then it is said the verdict returned should have been
 not guilty as a matter of course and against the weight of the evi-
 dence. These contentions require a review of the facts which the
 jury might have believed to be true and which seem to be as follows:

On August 7, 1929, Mrs. Harris, wife of defendant,
 opened an account with plaintiff in the name of her husband. The
 wife and daughter of defendant thereafter purchased various items
 of merchandise from this account. On August 19, 1929, the assistant
 credit manager of plaintiff advised Mr. defendant on the phone and
 told him that his account was getting quite large. Defendant paid
 he would send a check, not for the full amount but for a substantial
 part of it. The amount of the account at that time was \$101.79 and
 this was at that time particularly called to defendant's attention.
 Two or three days later plaintiff received a check for \$50.00 on the
 account. Whether the check was that of the defendant husband or

his wife does not appear from the evidence.

On January 3, 1930, plaintiff caused a letter to be mailed to defendant which reads as follows:

"We are enclosing your bill as of January second, showing a balance due of \$1225.62, of which sum \$835.32 is now considerably in arrears.

This matter requires your prompt attention and we trust you will send remittance covering at least the past due portion without delay."

On January 13th plaintiff wrote defendant:

"We recently wrote to you calling attention to your account on which there is an overdue balance at this time of \$1225.62, but as yet we have not been favored with a remittance nor reply to our communication.

This account is now so far in arrears that we are compelled to request settlement without further delay. We are, therefore, marking the matter ahead for five days in the hope that you will save us the necessity of taking some other steps to secure settlement."

On January 21st plaintiff wrote defendant:

"We have written to you on two previous occasions regarding your delinquent account but as yet have not received check in settlement nor any reply to either communication. You, of course, will realize that we can not allow the account to drag along in this manner and we are, therefore, compelled to say that unless we receive a remittance to take care of the account within the next five days, we will be forced to turn it over to our Collection Department for any action necessary to compel settlement."

No reply was received to these letters, and during the last week in January the assistant credit manager of plaintiff called up defendant and told him the amount of the account. He says defendant replied to the effect that Mrs. Dreis had run up a great many bills and had involved him very heavily in debt and that he wished to teach her a lesson and compel her to pay the bill; that defendant said she was in Florida and gave her address as 915 Jefferson Avenue, Miami Beach; that defendant asked that plaintiff write Mrs. Dreis insisting on settlement of the bill; that he (the assistant credit manager) told defendant he would be very glad to do that provided he might have an understanding with defendant that "he would take care of the bill if Mrs. Dreis did not," and that defendant said he would.

his wife does not appear from the evidence.

On January 3, 1930, Plaintiff caused a letter to be

mailed to defendant which reads as follows:

"We are enclosing your bill no. 07 January second, amount
of \$100.00, at which you have been notified.
in arrears.
This matter requires your prompt attention and we trust you
will send payment immediately to the bank and please return
copy."

In January 1930 Plaintiff wrote defendant:

"We respectfully write to you calling attention to your account
on which there is an overdue balance of \$100.00, for
as yet we have not been favored with a remittance nor reply to our
communications.
This account is now so far in arrears that we are obliged
to suspend payment without further delay. We are, therefore,
requesting the writer please pay the bill in the next few days
and as the necessity of making some form of payment is
urgent."

On January 1930 Plaintiff wrote defendant:

"We have written to you on two previous occasions regarding
your delinquent account but as yet have not received payment in full.
Plaintiff has now been obliged to suspend payment of the bill in
full until such time as you can make the payment in full. We
trust that you will, however, comply with our request and make
payment of the bill in full at the earliest possible date.
We are, therefore, requesting the writer please pay the bill in the
next few days and as the necessity of making some form of payment is
urgent."

A reply was received to these letters, and dated the

first week in January the said letter reads as follows:

called up defendant and told him the amount of the account. He

was extremely excited at the effect that Mrs. Smith had run up a

great many bills and had involved him very heavily in debt and that
he wished to cancel her a license and decide not to pay the bill; that

defendant said she was in Florida and gave her address as 212

Jefferson Avenue, Miami Beach; that defendant asked that Plaintiff

write her, which Plaintiff in compliance with the bill did

in the middle of January 1930. This defendant he said he was

and he is now residing at 212 Jefferson Avenue, Miami Beach.

Yours truly, "The writer" (signed by Plaintiff)

and that defendant will be notified.

Accordingly on January 31st a letter was written to Mrs. Dreis and no reply having been received the manager again took the matter up with defendant about February 10th and told him that a reply had not been received from Mrs. Dreis and that plaintiff insisted on defendant taking care of the bill. This witness said that defendant never told him he would not pay the bill and did not say that the account had been opened without his consent.

On January 29, 1950, E. P. Seibt, collection manager for plaintiff, saw defendant at defendant's office. He testifies that he took with him a statement which appears in the record as plaintiff's exhibit 3 and which shows a balance due of \$1221.62; that he handed this statement to defendant and asked him for a check and defendant said, "No;" that he asked defendant, "Why not?" to which he replied, "Collect from Mrs. Dreis." Seibt says he pointed out to defendant that the husband and the wife were both liable for this bill and defendant responded, "Maybe" or something to that effect; that defendant took the statement and wrote the Florida address of Mrs. Dreis on it, handed it back to him and requested that plaintiff write to her; that he asked defendant whether in the event she would not remit he would send a check and he said, "No." On or about February 15th Seibt talked with defendant by 'phone and defendant then said he would pay the amount of the bill in monthly installments covering a period of ten months, and if plaintiff wished to accept that offer it should write him and not 'phone him again. On February 15th plaintiff wrote defendant in substance that the plan outlined by him on that day was not satisfactory and insisted upon full payment at once.

Defendant testified that he knew there was an account in his name with plaintiff shortly before Seibt called upon him; that he did not remember the conversation by telephone with the assistant credit manager on October 28th, but that he was called

...that the matter up with defendant about February 1934 and told him
that a reply had not been received from Mrs. Ureola and that plain-
tiff believed an agreement had been made in the Bill. The witness
said that defendant never told him he would not pay the bill and
that he was sure that the witness had been asked to pay the bill.
On January 20, 1935, E. J. Ureola, defendant's partner
for plaintiff, was defendant at defendant's office. He testified
that he was with a witness who testified in the witness's
plaintiff's office and that he was a witness to the witness's
testimony. The witness testified that defendant had asked him to
look at defendant's bill, "and that he had looked at it, and
to which he replied, "Gee, I don't know Mrs. Ureola." Ureola says he
replied that he did not know Mrs. Ureola and that she was his
sister for this bill and defendant's property, "and he
to this effect: that defendant took the witness and wrote him
plaintiff's address of Mrs. Ureola on it, handed it back to him and
requested that plaintiff write to her; that he asked defendant
whether in the event she would not reply he would send a check and
he said, "No." He was asked whether this bill was paid with
and by "phone and defendant then said he would pay the money and
bill in monthly installments covering a period of ten months, and
if plaintiff wished to accept that offer he should write him and not
"phone him again. On February 1935 plaintiff wrote defendant in
substance that the bill was paid by him and that he was not
plaintiff and indicated some bill payment to him.

Defendant testified that he knew there was an account
in his name with plaintiff shortly before he was called upon him;
that he did not remember the conversation by telephone with the
witness except to say that he was called

several times about the account. He denies that he had ever sent any money on account. He says that the substance of his conversation with Seibt on January 29th was that he, defendant, said he thought it peculiar that plaintiff would allow a bill to run up to over \$1200 and then demand the money; that Seibt replied that he did not wish to embarrass Mrs. Dreis, and that he, defendant, stated that he would prefer to have her embarrassed to the extent of letting her know that there was an account against him rather than to be embarrassed himself by the request to pay \$1200. He says he did not admit that he owed the account; that a statement had been mailed him a few days before that time; that he did suggest communication be made with Mrs. Dreis in Florida in the hope of getting her to pay the account. He denies that he told Seibt by telephone that he would pay the account in monthly installments of ten per cent per month. He says, however, that he referred this account with others to his attorney and suggested that kind of an arrangement be made. He further says that he did not tell plaintiff's agent he would pay the debt in full and that he never admitted he owned the money; that he knew plaintiff had a claim against him but never admitted having received the goods; that he never received or ordered them.

On cross-examination defendant admitted that he had put an offer in writing, at which time he did not deny that he owed the money, but said that he never contracted the debt; that he enclosed a check for \$1200 in a letter, which check was returned to him. He admitted that the Florida address of Mrs. Dreis on the statement was in his handwriting.

It is not contended by defendant that there is any error in the instructions to the jury, and all conflict in the evidence as to issues of fact must therefore be regarded as settled in favor of plaintiff.

any money on account. He says that the substance of his conversation with Salts on January 19th was that he, Salts, told him that he thought it peculiar that Salts would allow a bill to run up to over \$1200 and then demand the money; that Salts replied that he did not wish to embarrass Mrs. Wells, and that he, Salts, stated that he would prefer to have the money in the form of letting her know that there was an account against him rather than to be embarrassed himself by the necessity to pay Salts. He says he did not think that he owed the account; that a statement had been mailed him a few days before (and that he did not know that communication he was with Mrs. Wells in relation to the account) and he was to pay the account. He denies that he said anything of the kind and would pay the account in monthly installments of ten per cent each month. He says, however, that he retained only account with Salts to his attorney and suggested that kind of an arrangement be made. He further says that he did not tell Salts that he would pay the account in full and that he never admitted he owed the money; that he never admitted that he was against him and never admitted a check received for money that he never received or ordered there.

On cross-examination Salts testified that he had not as often as testified at which time he did not deny that he owed the money, but said that he never contacted the lady; that he enclosed a check for \$1000 in a letter, which check was returned to him. He admitted that the check mailed to Mrs. Wells in the amount of \$1000 was in his possession.

It is not contended by Salts that there is any error in the instructions to the jury, and his conduct in the evidence as to failure of fact must therefore be regarded as settled in favor of Salts.

In State v. Ill. Cent. R. R. Co., 246 Ill. 188, the law of this State with reference to an account stated is thoroughly discussed. The opinion of the court states (p. 241):

"A stated account is an acknowledgment of an existing condition of liability of the parties, from which the law implies a promise to pay the balance thus acknowledged to be due. The terms 'stated' and 'settled' accounts are sometimes used as equivalent expressions. (1 Cyc 364 and cases cited; 1 Words and Phrases, v. 93; 1 Ency. of L. & P. 726, and cases cited; Chicago, Milwaukee & St. Paul Railway Co. v. Clark, 92 Fed. Rep. 966; McDow v. Brown, 2 S. C. 95.)"

In Shane v. DeLeon, 258 Ill. App. 435, this court said:

"The meeting of the minds of the parties upon the correctness of an account stated is usually the result of a statement of an account by one party and an acquiescence therein by the other. The form of an acquiescence or assent is, however, immaterial and may be implied by the conduct of the parties and circumstances of the case. Vol. 1 Corpus Juris, 687; Dolman v. Law Construction Co. 103 Kan. 635, 176 Pac. 145; 2 A.L.R. 67. Still, in order to constitute an account stated, there must in every case be proof in some form of an assent to the account, that is, a definite acknowledgment of the indebtedness in a certain sum and the assent must be voluntary. As a general rule, an admission of a balance or acknowledgment made by one party to another that a sum is due to the latter is sufficient prima facie evidence to prove an account stated. Vol. 1 Corpus Juris 638, par. 268."

We think that in this case the jury could reasonably find from the evidence the existence of an account stated to the amount of the judgment. In the first place, there is credible evidence that when the account was presented to defendant he asked that plaintiff write to Mrs. Dreis and said that if she did not pay it he would so do. It is true, he denied that he said this, but this made a question for the decision of the jury. In the second place, the fact that he at no time questioned the correctness of the account is a circumstance from which a promise to pay it might be inferred. In State v. Ill. Cent. R. R. Co., 246 Ill. 188, the Supreme court said (p. 246):

"But it is contended by appellee that the very retention of these accounts for so long a time was, under the authorities, an acknowledgment of their accuracy. (Murray v. Toland, 3 Johns. Ch. 569; Lockwood v. Thorne, 11 N. Y. 170; Mackin v. O'Brien, 33 Ill. App. 474.) In ordinary business transactions, if an account has been transmitted from one individual to another it will be deemed

a stated account from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a reasonable time. (1 Story's Eq. Jur., 10th ed., sec. 526.)"

The opinion goes on to state that what is a reasonable time depends upon the circumstances of each case, the ordinary course of business and the relationship of the parties; that no attempt has been made by the courts to lay down any general rule which will control. We think it is not unusual for a husband to receive bills for family expenses which have been incurred by his wife; that where, as here, he has knowledge that she is buying on an account kept in his name, it devolves upon him to object to the account when stated within a reasonable time, and that, failing to object, the ^{implied} promise to pay the account as stated arises. At least, it would seem that a jury might, without acting unreasonably, so find.

We conclude that it was not error for the court to refuse an instruction for defendant at the close of all the evidence, and that this court sitting in review is not able to say that the verdict of the jury is contrary to the manifest weight of the evidence. It follows that the judgment will be affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

35449

ERNEST A. FURKERT,
Appellant.

vs.

INDUSTRIAL GAS ENGINEERING CO.,
INC., a Corporation,
Appellee.

8 3 7
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

264 I.A. 633³

MR. JUSTICE MARCHETTI DELIVERED THE OPINION OF THE COURT.

This is an appeal by Furkert, complainant, from a decree entered overruling his exceptions to a report of a master and dismissing his bill of complaint for want of equity. The decree also granted relief to defendant on its crossbill.

The original bill prayed that an exclusive license theretofore granted by complainant to defendant might be declared void and set aside and defendant temporarily enjoined from operating under it. The crossbill prayed that the license might be declared valid and that complainant might be enjoined from violating the license agreement and required to account to defendant under it.

There is practically no conflict in the evidence as to the essential facts, which appear to be as follows: On September 17, 1923, Furkert filed his application in the United States patent office, asking that letters patent might be granted to him on a certain "Method ^{of} and Means for Drying." Letters patent therefor issued on October 19, 1926.

In the winter of 1923 to 1924 Furkert became acquainted with Eugene C. Smelin and Fred P. Buchlienbeck, who operated a business under the name of the Spalite Sign Company at 407 N. Wells street in Chicago. Smelin owned the machinery and assets of a defunct company which had formerly conducted its business at 134 West Lake street. Furkert was in the business of

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selling what was known as Selas machines, one of which he installed in the plant of Gmelin and Muehlenbeck on Wells street. He talked to them about his application for a patent and made arrangements with them to manufacture the heaters, in the production of which his invention was used, at their shop on West Lake street.

In January, 1924, Furkert started negotiations with Gmelin looking towards the organization of a corporation which would undertake the manufacturing and marketing of heating devices, the production of which was based upon the invention for which he had made application for letters patent. Pursuant to these negotiations the defendant corporation was organized under the laws of Illinois on March 22, 1924. Its articles provided that the capital stock should consist of 200 shares of common stock of the par value of \$100 a share. Thirty shares of this stock were at once issued to Furkert. He paid therefor \$3,000 in cash, which sum, however, he borrowed from Gmelin, to whom he gave his promissory note therefor, dated March 25, 1924, due on or before one year after date, with interest at six per cent. As collateral to this note Furkert delivered to Gmelin a certificate which had been issued to him for his 30 shares of stock in the defendant corporation.

The certificate of incorporation shows the incorporators to be complainant, Samuel F. Jacobson and Isaac Waggoner; that the object of the corporation is to manufacture, assemble, buy and sell gas, fire, air heaters and dryers, gas and electric furnaces, ovens, heating units and appliances; and states that Furkert has subscribed and paid for 30 shares, Jacobson one share and Waggoner five shares, all in cash and at a par value of \$100 each. Furkert, Jacobson and Waggoner were elected directors of the corporation. Furkert was elected president and treasurer.

and entered at once upon the duties of his offices, and his name as president is signed to the certificates of stock which were issued. The legal work in connection with the organization of the corporation was performed by Mr. Golden, who appears to have acted at the request of Gmelin.

On March 25, 1924, (and as the master finds) contemporaneous with the organization of this corporation, complainant executed and delivered to the new corporation an instrument in writing under seal, the material parts of which are as follows:

"In consideration of the sum of Ten Dollars and other good and valuable considerations, in hand paid to the undersigned, by the Industrial Gas Engineering Co., Inc., I hereby license and empower the said Industrial Gas Engineering Co., Inc., to manufacture exclusively, certain machines used in the method of and means for drying, or any improvements, alterations or changes thereon, for which Letters Patent have been applied for by the undersigned, as serial No. If, as and when the said Letters Patent of the United States shall be issued to the undersigned, and to sell machines so manufactured throughout the United States and foreign countries to the full end of the term for which said Letters Patent are granted, if, as and when granted.

It is understood that the undersigned has entered into a contract with the Phoenix-Hermetic Company of Chicago, to have the exclusive right to use the undersigned's patent for and in connection with the heating or operating of a conveyor even used for tin decorating and coating, which processes are covered by the application of the above Letters Patent applied for by the undersigned. By these Presents, the undersigned does hereby assign all of his right, title and interest in and to said contract, to the Industrial Gas Engineering Co., Inc., an Illinois corporation, and any and all royalties that may be received by the undersigned by virtue of his contract with the said Phoenix-Hermetic Co. shall be paid over by him to the Industrial Gas Engineering Co., Inc. In the event, however, the Industrial Gas Engineering Co., Inc. ceases to do business or dissolves, then such royalties so received by the undersigned from the said Phoenix-Hermetic Co. shall be the absolute property of the undersigned.

It is distinctly understood and agreed that in the event the Industrial Gas Engineering Co. Inc. ceases to do business or dissolves, then the license herein granted to manufacture exclusively certain machines used in the method of and means for drying, or any improvements, alterations or changes thereon, for which Letters Patent have been applied for by the undersigned, as Serial No. shall terminate and revert back to the undersigned; it being the intention only to grant exclusive license as hereinbefore recited to the Industrial Gas Engineering Co. Inc. only, and not its assigns by operation of law or otherwise."

The agreement between complainant and the Phoenix-Hermetic Co. referred to in this license was offered in evidence

and appears in the record.

At the time of the organization of the defendant company, complainant was employed by it at a salary of \$300 a month and thereafter acted as its president, treasurer and manager. He drew all the checks and in general seems to have had the entire control and management of the business up to about January, 1925.

About June 23, 1924, defendant corporation issued to Gmelin thirty shares of its common stock and received payment therefor partly in cash and partly in machinery and equipment to be used by the corporation in its business. The issuance of this stock to Gmelin was approved by complainant as a member of the board of directors of the defendant corporation. On or about July 10, 1924, seven shares of the common stock were issued to Muehlenbeck, who paid the corporation therefor the cash par value. Complainant also approved of the issuance of this stock. Muehlenbeck and Gmelin were then and had been for many years close friends, and the effect of the transfer of the 37 shares of common stock was to give them a majority of the outstanding capital stock of the defendant corporation.

The business of defendant prospered. Its balance sheet as of December 31, 1924, showed a net worth of \$11,868.30, with only \$7,300 as the total amount of capital stock issued.

In the latter part of 1924 complainant became dissatisfied and made complaint to Gmelin and others that he had granted the license without any cash payment, and on November 20, 1924, the matter was taken up for consideration at a meeting of the board of directors. He then requested that he be paid the sum of \$1,500 in consideration of having granted the license. This request was denied, the other members of the board voting against the allowance. At the same meeting the board voted to make an allowance to complainant of \$25 additional a month as compensation

for the use of his automobile about the business of defendant.

Although complainant acquiesced in this arrangement he did not in fact thereafter draw checks for this additional compensation. He resigned as president of the defendant corporation and thereafter took no part in conducting its business, and since that time both complainant and defendant have been manufacturing and selling devices and equipment constructed under the invention of complainant. The business of defendant corporation has at all times been founded upon complainant's invention. Defendant has from time to time notified complainant to refrain from infringing upon its rights as exclusive licensee, and complainant has treated the license as being of no force and effect.

March 25, 1925, the note of complainant to Gmelin fell due. Complainant shortly before its maturity wrote Gmelin that he was unable to meet the payment but he authorized Gmelin to take over the stock held as collateral in full payment. Gmelin has not cancelled the note or accepted the stock in full payment thereof and the thirty shares of stock, the certificate for which is held by Gmelin as collateral, still remain of record in the name of complainant. On the hearing Gmelin testified that he was ready and willing to return this certificate for the stock in payment of the note with interest thereon.

On or about December 21, 1925, complainant advised Gmelin that he did not intend further to prosecute the application for patent and that he would permit the same to lapse unless he were paid \$5,000 by defendant and the royalty upon each device thereafter made. March 10, 1926, the commissioner of patents gave defendant leave to prosecute this application, which it thereafter did at its own expense, and the patent, as already stated, was issued on October 19, 1926.

The master reported and the decree found that the invention of complainant was commercially and mechanically practical and that an injunction should be issued and an accounting ordered in accordance with the prayer of defendant's crossbill.

The evidence shows without contradiction, as the master reported and the decree found, that the organization of the corporation and the issuance and delivery of the license were all a part of one transaction, the purpose of which was the exploitation of complainant's invention. There is no evidence tending to show and it is not contended that there was any fraud or misrepresentation on the part of defendant corporation or of any person taking part in the transaction; but complainant contends that the license is void because it lacks mutuality and was granted without consideration. It is urged that therefore complainant had a right to revoke the license, and complainant cites a number of authorities, which he urges sustain his contention, such as Miller v. Moffat, 153 Ill. App. 1, where complainant filed a bill in equity to secure the cancellation of a written lease, whereby he purported to give Moffat the right to mine and remove coal from certain real estate described in the lease, and Moffat agreed to keep a correct account, render monthly statements and pay two and a half cents per ton for each tone of coal mined. The court said that in the agreement Moffat did not undertake nor was he required to mine any coal whatever during the life of the agreement; that if coal was mined he was required to pay a royalty, but that he did not agree to mine any quantity whatever nor was he bound under the contract to do so; that the contract was therefore void at its inception for lack of mutuality, and that complainant then had a right to have it cancelled which was thereafter lost through performance by defendant.

Complainant also cites Fluck v. Campbell, 129 Ill.101,

a case which involved the sale of certain bonds under the terms of a writing lacking mutuality. It was there held that a promise for a promise was not a valid consideration unless there was mutuality, so that each party might hold the other for the performance of his engagements. The opinion states in substance, however, that it does not follow that a contract in writing to be complete must show such mutuality on its face; that in many cases there is a seeming want of mutuality where the contract may be enforced by the parties on the same proof as would have been necessary if that mutuality had appeared in the contract; further, that where the writing amounts only to an offer on the part of the promisor, he will be bound after an engagement on the part of the promisee which is sufficient to bind him, the promisee, because in such case there would then be a promise for a promise with entire mutuality of obligation. In that case it was held that the promisee had become so bound and that the contract was valid and enforceable.

Alexander Hamilton Institute v. Jones, 234 Ill. App.

444, and Central Guaranty Co. v. Central Trust Co., 244 Ill. App. 61, are also cited, and in both cases it was held in substance that written agreements which were only in the nature of an offer did not become binding until accepted in such manner as would bind the offeree.

Complainant cites Crandall v. Willis, 166 Ill. 233;

Cortelyou v. Barnsdall, 236 Ill. 132, and Corbett v. Cranwhite, 239

Ill. 9, to the point that the license was granted without consideration and that complainant therefore had the right to revoke it.

These cases are all in many respects clearly distinguishable upon the facts, and even if accepted as applicable would not sustain the contention which is made by complainant. It is quite unnecessary to enter into any extended discussion of the complicated legal questions involved in diverse theories of mutuality and consideration. Perhaps

no better definition of consideration has ever been given than that stated in Currie v. Misa, L. R. 10 Exch. 153, which is accepted in Williston on Contracts, vol. 1, p. 211, as an "elaborate definition," namely, "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

The cases upon which complainant relies are to the effect that it is not at all necessary that it should appear from the face of a written contract that it was made for a valuable and valid consideration. We think it must be conceded to be true that if this license could be considered as expressing an entire contract between the defendant corporation and complainant, then under the definition we have stated it would be without mutuality and without valid consideration, since a careful reading discloses that it does not state that defendant will do anything to its detriment nor is any promise made therein which would in any way be of benefit to complainant. However, this license does not represent the whole agreement between these parties, nor, indeed, does it appear that the consideration upon which it was granted moved between complainant and defendant. The real agreement here was between plaintiff and Guelin; and the facts which we have recited show without any doubt that complainant as the owner of the invention wished to devise a plan by which the exploitation of it should be secured; that to that end he opened negotiations with Guelin; that to that end Guelin made a loan to him of \$5,000 which otherwise would not have been made; that to that end Guelin caused a corporation to be organized, which otherwise would not have been brought into existence; that to the same end stock was issued to complainant and he became president, director and general manager of the defendant company at a salary of the amount which he re-

requested. Gmelin would not have entered into these things, it is apparent, if it had not been for the promise of complainant to execute the license to the corporation to be organized. Gmelin was under no obligation to make the loan. He was under no legal obligation to cause the corporation to be organized. He was under no obligation to buy stock therein. It is perfectly apparent, as the decree finds, that the whole matter was one transaction in which complainant executed the license in consideration of the things which Gmelin and others agreed to do and perform. The transaction may not have been a wise one from complainant's standpoint. It may be that complainant could have obtained much better terms. That was his own affair with which the law has nothing to do. The law does not act as guardian of competent persons of full age or assume to make for them better contracts than they have been able to make for themselves, nor in the absence of fraud or mistake does it undo and relieve them from unwise contracts into which they may have entered. It should be remembered (which some of the cases cited would indicate complainant has not remembered) that this is not a bill brought by the grantee to secure a specific performance of a contract. An appeal of that kind to the extraordinary powers of a court of equity is always up to the discretion of the court, and it will not compel the performance of a contract which is oppressive, unjust and unfair. Thus, in National Gun & Mica Co. v. Braschly, 51 N. Y. Supp. 93, which is cited by defendant, the court granted specific performance of a contract in many respects like the one we have under consideration here. There is a vigorous dissenting opinion to which we are referred by complainant and with which we would be much impressed if the bill here was one which prayed for the specific performance of this contract.

There is another reason why we think complainant cannot maintain the contention that this license was given without considera-

There is another reason why we think complaint cannot maintain the contention that this license was given without consideration. It is not that the Government is not a party to the contract, but that the Government is not a party to the contract in the sense in which the word "party" is used in the contract. The contract is a contract between the Government and the licensee, and the Government is not a party to the contract in the sense in which the word "party" is used in the contract. The contract is a contract between the Government and the licensee, and the Government is not a party to the contract in the sense in which the word "party" is used in the contract.

tion. The license was granted under seal and it states upon its face that it is granted for a consideration of the sum of \$10. The proof upon the trial showed that this \$10 was never in fact paid, but this was due to the failure of complainant, who was then the president and treasurer of the company, to draw the check and make the payment. In other words, it is his fault if the payment has not been made. The law in Illinois seems to be well settled that while the consideration upon which a contract is made may be usually inquired into and the facts ascertained, such inquiry is not permitted for the purpose of showing that the contract is invalid and void. This would seem to be the rule applied even in cases where specific performance is prayed, such as the case of Crandall v. Willig, 166 Ill. 233.

The question has been thoroughly discussed in Fee v. Ulrey, 235 Ill. 56, where a complainant prayed and the trial court decreed that a certain lease which had been made in writing under seal for a stated consideration of one dollar should be set aside. It was claimed that this lease was void for want of actuality and because it was unfair, harsh and unconscionable and because the grantee had failed to comply with the terms thereof. Upon appeal to the Supreme court it was there contended that the Circuit court had rightly entered the decree setting aside the lease for the reason that the consideration was not in fact paid. The opinion by Mr. Justice Cartwright states the limitation we have announced, as follows:

"But while the recital of the payment of the consideration in an instrument may be contradicted for such purposes, an acknowledgment of such payment cannot be contradicted by parol for the purpose of invalidating the instrument or impairing its legal effect as a conveyance. (Stannard v. Aurora, Elgin and Chicago Railway Co., 220 Ill. 469.)"

There is, of course, abundant authority to the effect that a court will not inquire into the alleged inadequacy of the

consideration for a contract under circumstances such as here appear. Muller v. Ryan, 306 Ill. 38.

There is a further reason in our opinion, why complainant cannot maintain this action. The license which complainant seeks to have set aside is dated March 25, 1924. His bill was filed May 16, 1928, more than four years after the license was made and more than four years after business operations thereunder had been begun. In the meantime he knew that other persons were purchasing stock in the company, whose entire business was based on the exploitation of his invention. He knew that expenses were being incurred in carrying on that business, all of which were based upon this contract which he made. Every day that passed by rendered it more and more impossible for him to restore the status quo in case he was allowed to rescind the license which he had given. Complainant cites cases to the point that where there is no consideration a complainant may rescind without offering to return any consideration, - a statement which is quite obviously true - but we have already seen that there was a consideration in this case, although the consideration moved from persons other than and distinct from the corporation which was organized. Complainant therefore would seem on the plainest principles to be estopped in a court of equity by his laches. He is now in a position where it is quite impossible for him to restore the status quo, and he does not offer to do so. The well known rule of equity will not allow that he who fails to speak when it is his duty to speak shall afterwards speak when it is his duty to remain silent. There are many cases which might be cited to this point, but numerous citations would not add anything to the force of Muller v. Ryan, which we have already cited.

Many other points are discussed in the voluminous briefs which have been filed, but we do not deem it necessary to

DATE

These data suggest that the model is a good fit for the data.

discuss them.

Although defendant contends that the court is without jurisdiction to consider the bill because it involves the infringement of a patent, while it inconsistently asserts its right on the crossbill to have an injunction against the unwarranted disregard by complainant of the license, it is perfectly clear that there is no question of the validity of a patent involved in this case. If we are right in our conclusion that the license is valid and that complainant is not entitled to have the same set aside, it follows that defendant is entitled on its crossbill to have an injunction against plaintiff which will prevent in the future the disregard of the license^{given} by him and will compel an accounting as to the damages defendant has already sustained in that regard. Manning v. Gallard-Manning P.M.D. Mfg. Co., 141 Wis. 199; Walker on Patents, 6th ed., vol. 1, sec. 361, p. 449, and cases there cited; Mayer Press Drill Company v. Ashhurst, 148 Ill. 115; Bird v. Thenhouser, 160 Ill. App. 653.

It follows that the decree of the trial court will be affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

[illegible]

Life from 1913 and 1914 and out 1915 and 1916

[illegible]

CONTINUED

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35476

SIDNEY KORSNAN,
Appellee,

vs.

S. J. ROSENBLATT and
JAMES ROSENBLATT,
Appellants.

847
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 E.A. 633⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment in the sum of \$250 entered upon the finding of the court. The statement of claim averred that this amount of money had been obtained from plaintiff by defendants through false representations and threats to withhold a check belonging to plaintiff's mother which represented the proceeds of an insurance policy on the life of plaintiff's deceased father, Harry Korsnak. The affidavit of merits admitted the receipt of \$250 from plaintiff, denied that it was obtained by any untrue or false representations, and asserted that plaintiff gave defendants that amount in payment of an indebtedness which they held against the estate of the deceased father of plaintiff.

It is insisted by defendants in the first place that the evidence was insufficient to establish the fact of fraud, and that the burden of proof was on plaintiff to establish that fact. This contention requires a review of the evidence. There were only two witnesses in the case. Plaintiff gave evidence tending to show that defendants were insurance agents and that the father of plaintiff in his lifetime held a policy in a company represented by them, the policy being payable upon the father's decease to plaintiff's mother; that plaintiff, a lawyer, filled out the proofs of loss on the policy and brought them to the office of defendant James Rosenblatt, who at that time told plaintiff that he held a note of

88450

EDWARD ROBERTSON,
Applicant.

S. J. ROBERTSON and
JAMES ROBERTSON,
Applicants.

MR. JUSTICE MONTGOMERY DELIVERED THE VERDICT OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$2000 entered upon the finding of the jury. The case is one of claim asserted that this amount of money had been obtained from plaintiff by defendant through false representations and threats to withhold a check belonging to plaintiff's mother which represented the proceeds of an insurance policy on the life of plaintiff's deceased father, now deceased. The affidavit of service submitted was verified at New York City, dated that it was obtained by the service of a copy of the complaint, and answered that plaintiff gave defendant that amount in payment of an indebtedness which they held against the estate of the deceased father of plaintiff. It is insisted by defendant in the first place that the evidence was insufficient to establish the fact of fraud, and that the burden of proof was on plaintiff to establish that fact. This contention requires a review of the evidence. There were only two witnesses in the case. Plaintiff gave evidence tending to show that defendant was insurance agent and that the father of plaintiff in his lifetime held a policy in a company represented by them, the policy being payable upon the father's death to plaintiff's mother; that plaintiff, a lawyer, talked and the proceeds of loss on the policy was brought them to the office of defendant James Robertson, who at that time told plaintiff that he held a note of

plaintiff's father for the sum of \$400 which was payable to his (defendant's) father and which had been given in payment of the first premium on another and different insurance policy, and that the home office in Indianapolis was holding up payment of this policy, which was for \$1300, to plaintiff's mother until the note should be paid; that plaintiff told James Rosenblatt that his father had left no estate or money whatsoever and he did not think the note should be paid; that Rosenblatt told plaintiff that the home office was holding up the check until \$250 was paid, whereupon plaintiff gave to him his check dated February 9, 1931, payable to the order of S. J. Rosenblatt for \$250. Plaintiff says that he told James Rosenblatt that he did not have any money at the time and that Rosenblatt would have to hold this check until the other check cleared; that two hours later he came back to the office of defendants, and that the Insurance company's check was there. He further says that in the afternoon he discovered that while the check to his mother was given on a policy issued in 1917, the note for which he paid \$250 was dated in 1927; that he then called James Rosenblatt and told him he was going to start a law suit and that Rosenblatt said he would pay him the \$250; that on the following day Rosenblatt said he would talk it over with his father and afterwards announced that they refused to return this \$250 to plaintiff.

The note is in evidence and is dated July 29, 1927, due 90 days after date to the order of S. J. Rosenblatt with interest at six per cent per annum and signed by Harry Korshak, plaintiff's father. Plaintiff received the note from James Rosenblatt at the same time he gave Rosenblatt the check. It appears that the note in question was given as the first year's premium on a policy other than the one upon which plaintiff was collecting for his

plaintiff's father for the sum of \$2500 which was payable to his (defendant's) father and which had been given in payment of the first premium on another and different insurance policy, and that the home office in Indianapolis was holding its payment of this policy, which was for \$1500, to plaintiff's mother until she note should be paid; that plaintiff told James Rosenblatt that his father had left no estate or money whatsoever and he did not think the note should be paid; that Rosenblatt told plaintiff that the home office was holding up the check until \$2500 was paid, whereupon plaintiff gave to his father check dated February 9, 1931, payable to the order of M. J. Rosenblatt for \$2500. Plaintiff says that he told James Rosenblatt that he did not have any money at the time and that Rosenblatt would have to wait until the check was cashed. Plaintiff says that two hours later he came back to the office of defendant, and that the insurance company's check was there. He further says that on the afternoon of the next day he called the check to his mother who gave on a policy issued in 1917, the note for which he paid \$2500 was dated in 1937; that he then called James Rosenblatt and told him he was going to start a law suit and that Rosenblatt said he would pay him the \$2500; that on the following day Rosenblatt said he would take it over with his father and afterwards announced that they returned to return this \$2500 to plaintiff.

The note is in evidence and is dated July 20, 1937, due 30 days after date to the order of M. J. Rosenblatt with interest at six per cent per annum and signed by Harry Foxworth, plaintiff's father. Plaintiff received the note from James Rosenblatt at the same time he gave Rosenblatt the check. It appears that the note is payable to plaintiff as the check was a payment on a policy that was the one which plaintiff was interested in.

mother and was given upon a policy which had evidently lapsed. The consideration for half the amount of this note was reimbursement for the amount paid by Rosenblatt to the insurance company and the other half was the agent's commission. The mother of plaintiff received \$1300, being the face of the policy which she held less the loan of \$700 which had been made thereon.

The evidence of defendant James Rosenblatt is to the effect that when plaintiff first came in and asked for ^{forms of} proofs of loss he told plaintiff about the \$500 note which plaintiff's father had signed and which his (defendant's) father had been trying to collect for a number of years and said that it would be only fair that his (defendant's) father should be reimbursed. He says that plaintiff told him that his (plaintiff's) father had no estate and that his mother had another policy of \$10,000 with the Mutual Life; that plaintiff said he would take the matter up with his mother; that when plaintiff brought back the proofs of loss he told him (defendant) that his mother would not want to pay anything but that he would pay \$250 after he had collected the \$10,000 from the Mutual Life Insurance Co.; that he (defendant) told plaintiff he had nothing to do with that. James Rosenblatt also testified that it took a day after the home office got the proofs of loss for him to get the check; that plaintiff was in the office the Monday morning the check came and asked for it; that defendant told plaintiff it had not come in yet but that he would get the home office mail later in the morning.

This defendant further testified that on plaintiff's first visit to the office he showed the note to him and that he received the check from the home office after plaintiff had given him the \$250 check in the morning; that thereafter when plaintiff came to his office he gave him the check and nothing further was said; that at that time he gave plaintiff the note. He denies that

mother and was given upon a policy which had evidently lapsed.
 The consideration for half the amount of this note was returned
 ment for the amount paid by defendant to the insurance company
 and the other half was the agent's commission. On August 27
 plaintiff received \$2,000, being the face of the policy which was
 paid less the loan of \$200 which had been made thereon.
 The witness of defendant's house testified as to the
 fact that when plaintiff first came in and asked for proceeds of
 loan he told plaintiff about the \$200 note which plaintiff's father
 had signed and which his (defendant's) father had been trying to
 collect for a number of years and said that it would be only fair
 that his (defendant's) father should be reimbursed. He says that
 plaintiff told him that his (defendant's) father had no estate and
 that his mother had another policy of \$10,000 with the Mutual Life;
 that plaintiff said he would take the matter up with his mother;
 that when plaintiff brought back the proceeds of loan he told him
 (defendant) that his mother would not want to pay anything and that
 he would pay \$200 since he had collected the \$10,000 from the Mutual
 Life Insurance Co.; that he (defendant) told plaintiff he had nothing
 to do with it. About November 1st defendant told him that he had
 after the home office got the proceeds of loan for him to get the
 check; that plaintiff was in the office the Monday morning the
 check came and asked for it; that defendant told plaintiff it had
 not come in yet but that he would get the home office mail later
 in the morning.
 This defendant further testified that on plaintiff's
 first visit to the office he showed the note to him and that he
 received the check from the home office when plaintiff had given
 him the \$200 which is the money; that defendant was plaintiff's
 agent to his office to give him the check and nothing further was
 said; that at that time he gave plaintiff the note. He further says

he ever said anything about holding up the check for \$1300. He was a cashier of the insurance company and his father was its general agent. In response to the question as to whether at any time he told plaintiff that the company would hold up payment on the policy unless the note was paid, he replied, "I could not do that." He particularly denies that he at any time said to plaintiff that the \$500 note was payable to the company. He admits that plaintiff asked him to hold his (plaintiff's) check up for awhile and that he held it up until the afternoon. He also admits that plaintiff called him up and asked for his money back, but says he told him that he (defendant) would keep it.

It is quite strenuously argued by defendants that the evidence fails to disclose that the payment of the \$250 was compulsory or made under duress. Alston v. City of Chicago, 40 Ill. 514; Stover v. Mitchell, 45 Ill. 313, and Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284, are cited. We agree with defendants in that contention. We also agree with them that proof of fraud must be clear and that the burden of proof is upon plaintiff to establish it. Defendants cite a number of cases to this point. (Schroeder v. Walsh, 120 Ill. 403; McKannan v. Mickleberry, 242 Ill. 117.) This proposition is well settled by these and other decisions which might be cited. It must be remembered that upon appeal the finding of the court is entitled to the same weight as the verdict of a jury, and that the question for this court to determine is whether the finding of the Judge who saw the witnesses and tried the case is clearly and manifestly wrong. It is undisputed that defendants succeeded in procuring a payment from plaintiff to which they were not entitled, and plaintiff upon the whole record gives the more probable account of the transaction. Plaintiff was quick to demand back his money, and defendant seems to have given consideration to the demand, although it was finally

refused. We are of the opinion that the evidence is sufficient to establish the allegation that untrue representations were made in order to obtain this payment.

Defendants, however, further contend that there is no proof of their joint liability. The action is in contract. Sec. 54 of the Practice act provides that proof of joint liability in such cases shall not be necessary unless defendant shall file a plea denying joint liability, verified by affidavit. There is no such plea or affidavit here. Judgment was therefore properly entered against both defendants. Johnson v. Leinold, 206 Ill.App. 337; Sears, Roebuck & Co. v. Wolf, 246 Ill. App. 550.

It is further contended that plaintiff cannot recover upon the theory of fraudulent representations because he did not offer to return the consideration (in this case the note) at the time he demanded a return of the money obtained from him. Plaintiff, however, acted very promptly in the matter, and while the evidence, it is true, does not disclose that he tendered back the note, it does disclose that the request for rescission of the transaction was made by telephone and was taken under consideration by defendant and afterwards refused. Moreover, the note was long past due, and there is evidence in the record tending to show that it was worthless. The general rule that one wishing to rescind for fraud must tender back the consideration does not seem to apply in a case of that kind. (Mitchell v. Mitchell, 263 Ill. 165). At any rate, the note was tendered to defendants upon the trial, but the tender was refused.

For the reasons we have indicated, the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

refused. We are of the opinion that the evidence is sufficient to establish the allegation that certain representations were made in order to obtain this payment.

Defendants, however, further contend that there is no proof of their joint liability. The action is in contract. As at the time the parties were joined, the law was such that each party shall not be necessary unless defendant shall file a plea denying joint liability, verified by affidavit. There is no such plea or affidavit here. Judgment was therefore properly entered against both defendants. Michael v. Michael, 104 Cal. 447, 38 P. 2d 1001, 1002.

It is further contended that plaintiff cannot recover upon the theory of fraudulent representation because he did not offer to return the consideration (in this case the note) at the time he brought a return of the money obtained from him. Plaintiff, however, acted very promptly in the matter, and while the evidence is in fact, true and reliable that he returned the note, it does disclose that the request for redemption of the transaction was made by defendant and was taken under consideration by plaintiff and afterwards returned. Moreover, the note was long past due, and there is evidence in the record tending to show that it was worth less. The general rule that one dealing in realty for time must return the consideration does not seem to apply in a case of that kind. (Michael v. Michael, 104 Cal. 447, 38 P. 2d 1001, 1002). At any rate, the note was tendered to defendant upon the trial, but the tender was refused.

For the reasons we have indicated, the judgment of the trial court is affirmed.

O'Connor, J., and Burgess, J., concur.

35506

ROY R. BAKER,
Appellee,

v.

JOHN B. LUDWIG,
Appellant.

85-7
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

264 I.A. 633⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Baker sued in assumpsit for commissions claimed to be due for services rendered in procuring a purchaser of defendant's farm. The declaration consisted of several counts and alleged the employment of plaintiff by defendant, plaintiff's license as a broker and the agreement to pay plaintiff a commission of five per cent in case he effected a sale. The declaration also alleged the employment was made on June 20, 1927, and the sale of the farm to the Memorial Parks Development, Trustee, on January 29, 1928, for \$80,000. The common counts were attached to the declaration.

Defendant filed a plea of the general issue with an affidavit of merits denying that the sum named in the declaration was due or that plaintiff was a duly licensed broker and denying the alleged oral agreement or that plaintiff effected a sale of the property in question.

The cause was tried by a jury which returned a verdict in favor of plaintiff in the sum of \$4,000, and the court overruling motions for a new trial and in arrest entered judgment. The cause has been twice tried by a jury. On the former trial a verdict was returned in favor of plaintiff for a similar amount.

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APPROVED FOR SIGNATURE

DATE

2641.A. 683

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court.

Before me the undersigned authority, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed. I have hereunto set my hand and seal of office in presence of _____, a competent disinterested person, who with me acted as witness to the execution of the foregoing instrument. The commission expires _____.

Notary Public in and for the State of _____

My commission expires _____.

The case was tried by a jury which returned a verdict in favor of Plaintiff in the sum of \$10,000, and the court rendering judgment for a new trial and an award of costs. The case has been twice tried by a jury. On the fourth trial a verdict was returned in favor of Plaintiff for a certain amount.

Defendant first insists that the verdict is against the evidence and, indeed, contends that plaintiff failed to make out a prima facie case and that the court erred in refusing to give to the jury certain instructions offered by defendant.

There is a decided conflict in material testimony, but that given in behalf of plaintiff, which apparently the jury believed, would seem to be as follows:

There seems to be no dispute that plaintiff is a duly licensed broker and that on June 20, 1927, he undertook to sell the farm in question at a price of \$500 an acre net for defendant. Plaintiff gave evidence tending to show that in June, 1927, plaintiff met defendant at defendant's office in Lemont, Illinois, in the presence of a John Herre, another broker, who was introduced to defendant as a prospective purchaser of acreage. Plaintiff says that defendant at that time asked what difference there would be in having two brokers working on the same deal. Plaintiff testifies: "I told him there would be no difference; that he would pay me the 5% on the sale price of the property and that I would take care of the other broker. Doctor Ludwig said, 'All right, go ahead.' I told him Mr. Herre and I would have to bring Mr. Herre's prospects to look at the property. He said, 'Go ahead, I will help you all I can in the sale of the property.'"

Plaintiff also testifies that on July 22, 1927, Milton J. Bryce went to plaintiff's office in the evening; that he (plaintiff) at that time called defendant on the 'phone and told him he had a prospective purchaser named Bryce; that he arranged with defendant to take this purchaser out to the property the following afternoon; that defendant said his price was \$500 an acre net to him, and that plaintiff replied, "In that case we will have to price it to these people at \$525 an acre." Plaintiff says defendant at

Defendant first insists that the verdict is against the evidence and, indeed, contends that plaintiff failed to make out a prima facie case and that the court erred in refusing to give to the jury certain instructions offered by defendant. There is a decided conflict in material testimony, but that given in behalf of plaintiff, which, reasonably, the jury believed would seem to be as follows:

There seems to be no dispute that plaintiff is a duly licensed broker and that on June 30, 1937, he understood to sell the farm in question at a price of \$2000 on any day thereafter. Plaintiff gave evidence tending to show that in June, 1937, plaintiff met defendant at defendant's office in Kansas, Missouri, in the presence of a Mrs. Mary, another friend, who was introduced to defendant as a prospective purchaser of property. Plaintiff says that defendant at that time told him that defendant would be in having two friends waiting on the same deal. Plaintiff testified: "I told him there would be no difference; that he would pay me the \$2000 on the sale price of the property and that I would take care of the other papers. I never thought of it then, but as ahead, I told him Mr. Harris and I would have to bring Mr. Harris's prospects to look at the property. He said, 'Oh ahead, I will bring you all I can in the sale of the property.'"

Plaintiff also testified that on July 20, 1937, Harris, who was to bring plaintiff's office in the evening; that he (plaintiff) at that time called defendant on the phone and told him he had a prospective purchaser named Harris who was coming with defendant to take this property and to pay for it. The following afternoon, Harris called his wife and told her that he was to take that and that plaintiff would take care of the other papers. It is these people as sell on June 30, 1937, Harris says defendant at

this time told him that he would protect plaintiff by including his commission in the price. He further says that on July 23, 1927, Bryce came to his office; that they went together to the farm where they met defendant according to appointment; that Bryce then said to defendant that he thought the property looked satisfactory and asked if defendant had a full 160 acres and what the price was; that defendant replied that he had the full number of acres and that his price was \$500 net to him. Plaintiff says Bryce then asked, "where is Baker taken care of," whereupon defendant laughed and said, "Brokers don't need any commission; they don't need to eat," and that plaintiff replied, "Here's one broker that needs to eat and is looking to you for his commission on this sale;" that Bryce and plaintiff then drove back to Chicago, leaving defendant at the farm.

Plaintiff further testifies that Bryce thereafter on July 27th, September 3rd, and September 16th called at plaintiff's home where the proposed purchase of this property was discussed; that he did not see defendant again until February 22, 1928, and then at defendant's office in Lemont and in the presence of Edwin Turner; that on the way out they stopped at the farm and talked with the caretaker and saw that it was being used for cemetery purposes. Plaintiff says that he then at defendant's office showed defendant a circular which he had received from Turner and which had been sent out by Bryce, showing Bryce to be general manager of the Memorial Parks Development and Trust Company; that this circular stated that they had acquired the property and were going to market it for cemetery purposes. Plaintiff says he called defendant's attention to the names written on the circular and asked him if he had sold the land to Milton Bryce; that defendant said he had and that he had received \$80,000, or \$500 an acre for the 160 acres. Plaintiff

...the time that he was in the ...
...the ... in the ...
...the ... to his ...
...they met defendant according to ...
...to defendant that he thought the property looked ...
...asked if defendant had a ...
...defendant replied that he had the ...
...price was \$500 not by him. ...
...is just about ...
...don't need any ...
...replied, "Here's the ...
...the ... on this ...
...back to Chicago, leaving defendant at the ...
...plaintiff further testified that ...
...27th, September 1937, and ...
...about the ... of this property was ...
...did not see defendant again until February 28, 1938, and then at
...defendant's office in ...
...that on the way out they stopped at the ...
...carpenter and saw that it was being used for ...
...plaintiff says that he then at defendant's office showed defendant a
...envelope which he had received from ...
...and by Hyman, showing Hyman to be ...
...this investigation and Hyman ...
...they had ... the property and were ...
...plaintiff says he called defendant's ...
...in the ... on the ...
...the ... to Milton Hyman; that defendant said he had and that he
...and received \$500,000 on \$500 as ...

then asked defendant if he had received a letter written to him by plaintiff on September 17, 1927, and defendant replied that if he had it was in the files somewhere. Plaintiff then told defendant he had come to collect his commission which was \$4000. Defendant replied that he did not consider that he owed him any commission as he had closed the deal direct with Bryce. Plaintiff further says that defendant stated that if anybody owed a commission it was Bryce, and that he, defendant, would talk with Bryce and see what he would say about it.

On cross-examination plaintiff admitted that he never advertised the farm in the newspapers and stated that he quoted it to several brokers and real estate men and to all the prospects he knew.

Herre testified corroborating the testimony of plaintiff as to the alleged conversation with defendant in his presence and plaintiff's testimony as to the conversation of February 22nd is corroborated by Turner.

Defendant testifies that plaintiff had never been in his office with Herre; that he never had any conversation with plaintiff about the sale of the farm in the presence of Herre; that he had no conversation with plaintiff at his (defendant's) office on June 20, 1927; that he did not tell plaintiff to go ahead and that he would help him in the sale of the property. He says that along the latter part of 1927 plaintiff telephoned him that he would bring someone to look at the farm and wanted to know if he defendant would meet him; that he thinks that was June 23rd; that plaintiff said he would bring a man out and he would quote \$500 net to defendant; that they came out about an hour and a half after plaintiff 'phoned and that he met plaintiff and Bryce at the farm at that time. Defendant denies in detail the testimony of plaintiff as to prior conversations by

When asked defendant if he had received a letter written to him by Plaintiff he answered "Yes, but I do not know who it was from."

On 10/10/1964, the following information was received from the Bureau of the Federal Bureau of Investigation, Washington, D.C.:

... ..

[illegible]

'phone. He says that after the meeting of plaintiff at the farm he next saw plaintiff in a business capacity in September, 1927; that in the latter part of July Bryce came to him and said he could not procure anyone to buy the farm at \$500 an acre, and that in September he (defendant) organized a company and started the farm going as a cemetery. Defendant says, "Mr. Bryce and I were the main ones in the venture;" that after Bryce said he could not buy the farm, a Mr. Scheel and a Mr. Busukiewicz, with defendant, tried to organize the farm into a cemetery; that they did not succeed and later they got in touch with Bryce, who acted as sales manager, and in February defendant deeded a part of the farm for cemetery purposes, at first ten acres at \$500 an acre and later the remainder of it at the same price. Defendant further says that Bryce invited him to come into the trust organization which made the purchase and that he (defendant) took between \$5,000 and \$6,000 worth of stock which he still has. He admits the close of the deal on the whole farm and the receipt ^{of} \$4500 an acre for it. He could not explain what kind of a trust organization was formed.

Defendant offered in evidence a letter written by plaintiff dated March 27, 1927, in which he stated in substance that he had a man who professed to be very much interested in the property; that this man was in the real estate business and was working in the interest of some one else and "would side-step me if he could gracefully do so." The letter adds:

"Therefore I am enclosing an exclusive listing blank, which I wish you would sign and return for my protection, while working on this lead. I have shown it for 60 days and at a price of \$500.00 an acre net to you or \$20,000 with about \$20,000 to \$25,000 cash down to you and the rest on or before five years. Is that satisfactory?"

Bryce testified that he first met plaintiff the last part of June or the first part of July, 1927; that he went to see him during the day time about noon; that he had never seen him

[illegible]

before; that he talked with plaintiff about getting a piece of land suitable for a cemetery; that he thinks that plaintiff stated who owned this property and that he, Bryce, suggested that they go out to see it; that he had his own machine there, and that he and plaintiff went out together to see the property; that plaintiff told him that the price was \$500 an acre net to the owner, and this was the price defendant quoted to them when they got there; that nothing else happened and that he drove plaintiff back to Chicago. Bryce further testifies that he called on plaintiff twice after going to the farm, and that about the latter part of July defendant and two associates in a bank in Lemont decided they would take the development of this property as a cemetery; that he, the witness, at that time was "just waiting;" that in September he suggested to defendant a different plan, and that they organized a common law trust estate and took over an agreement to purchase the property from defendant for \$80,000.

In view of this conflicting evidence, we think the case was clearly for the jury, and with the jury finding the facts in favor of plaintiff we are not able to say as a matter of law that he was not entitled to recover or that the verdict of the jury is against the manifest weight of the evidence. If plaintiff's testimony is true, plaintiff produced the customer through whom the sale was in fact made. There is no doubt that the customer was accepted by defendant, and under such circumstances plaintiff would be entitled to recover his commission, although the sale was made at a price different from that which plaintiff was authorized by defendant to obtain. Two juries have passed upon the facts with like results, and we have little reason to doubt that a similar verdict would be returned if the facts were submitted to a third jury. The law is well settled that an owner cannot defeat the right

before; that he talked with Plaintiff about getting a piece of
 land suitable for a cemetery; that he thinks that Plaintiff wanted
 who owned this property and that Mr. Byrnes suggested that they go
 out to see it; that he had his own machine there, and that he and
 Plaintiff went out together to see the property; that Plaintiff
 told him that the price was \$2000 an acre and so the owner, and this
 was the price defendant quoted to them when they got there; that
 nothing else happened and that he drove Plaintiff back to Chicago.
 Byrnes further testifies that he called on Plaintiff twice after going
 to the farm, and that about the latter part of July defendant and he
 newspaper in a bank in Chicago; that they would take the develop-
 ment of this property as a cemetery; that he, the witness, at that
 time was "just waiting" that in December he suggested to defendant
 a written plan, and that they executed a written plan for the
 and took over an agreement to purchase the property from defendant
 for \$20,000.
 In view of this conflicting evidence, we think the more
 was directly for the jury, and with the jury finding the facts in
 favor of Plaintiff we are not able to say as a matter of law that
 he was not entitled to recover or that the verdict of the jury is
 against the weight of the evidence. If Plaintiff's
 testimony is true, Plaintiff produced the evidence through whom
 the sale was in fact made. There is no doubt that the evidence
 was accepted by defendant, and that defendant's Plaintiff
 would be entitled to recover his commission, although the sale was
 made at a price different from that which Plaintiff was authorized
 by defendant to obtain. The prices have passed upon the facts with
 like results, and we have little reason to doubt that a similar
 verdict would be returned if the facts were submitted to a third
 jury. The law is well settled that no court should disturb the rights

of a broker to his commission for producing a customer by himself selling to the customer at a price less than he had authorized the broker to take. Adams v. Decker, 34 Ill. App. 17; Carter v. Webster, 79 Ill. 435.

It is next contended that the court erred in giving to the jury at plaintiff's request the following instruction:

"The Court instructs the jury that if you believe from the evidence in this case that the defendant employed the plaintiff as his agent to negotiate the sale of defendant's land, and the plaintiff undertook said employment and was instrumental in bringing together the buyer and the defendant, then, and in that case the plaintiff is entitled, as a matter of law, to recover from the defendant compensation for his services, if any are shown by the evidence, regardless of the fact that the defendant himself concluded the sale, and upon a price less and upon terms different from those at which the plaintiff was authorized to sell, provided you believe from the evidence that plaintiff's undertaking, if any is shown by the evidence, was not abandoned by the plaintiff."

It is urged that this instruction was erroneous in that while it directed a verdict it ignored the defense of defendant that he had an agreement with plaintiff to sell the property at the price of \$500 an acre net to him, and that when the court assumed as a fact that defendant concluded the sale upon terms different from those at which plaintiff was obliged to sell, it was assuming a fact which was not in evidence. There was, however, no proof of such agreement between plaintiff and defendant, although the evidence was undisputed that defendant's asking price was \$500 per acre net, but even if such agreement with plaintiff is assumed, we would hold that the instruction was not erroneous. It was approved substantially in Henry v. Stewart, 135 Ill. 448.

Defendant also insists that the court erred in refusing to give an instruction as requested by him to the effect that if the jury found that there was an agreement between plaintiff and defendant whereby plaintiff undertook to procure a purchaser at the price of \$500 per acre net to defendant, and if the jury further found by a preponderance of the evidence that the property

was afterwards sold to a purchaser procured by plaintiff or otherwise at the rate or for the sum of \$500 net to defendant, then plaintiff could not recover. If we have rightly held that the instruction first above considered was not erroneous, then it must also be held that it was not error to refuse this instruction which is entirely inconsistent with the other. This instruction would have in effect told the jury that if there was an agreement that the price should be \$500 per acre net to defendant, then plaintiff could not recover, even though defendant himself sold to the customer produced by plaintiff for \$500 per acre.

Complaint is also made that the court refused defendant's requested instruction which would have told the jury that they were the judges of the credibility of the witnesses and of the weight to be attached to the testimony of each and all of them and that the jury were not bound to take the testimony of any witness as absolutely true and should not do so if they were satisfied from all the facts and circumstances proved on the trial that such witness was mistaken in the matters testified to by him or that for any other reason his testimony was untrue or unreliable. It is urged on the authority of Revancy v. Otis Elevator Co., 251 Ill. 22, and Brant v. C. & A. R. R. Co., 294 Ill. 606, that this instruction should have been given. Although the instruction might well have been given, it was general in its nature and was, we think, substantially covered by other instructions in the case.

There is no reversible error in the record, and for that reason the judgment will be affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

was afterwards sold to a purchaser procured by plaintiff on account of the fact that the same was not so valuable, then

were not sworn to take the testimony of any witness as official
be attached to the testimony of each and all of them and that the in-
the judges of the credibility of the witnesses and of the weight to
be given to their testimony which would have said the jury that they were

complaint is also made that the court refused to allow the

[illegible][illegible]

There is no restriction on the number of copies of this form that may be made for personal use.

1. *Phragmites australis* (Cav.) Trin. ex Steud.

35506

ROY R. BAKER,
Appellee,
vs.
JOHN B. LUDWIG,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

264 I.A. 633⁶

ADDITIONAL OPINION ON REHEARING.

Defendant has filed a petition for a rehearing in which it is urged with some reason, we think, that this court did not give proper attention in the opinion filed to his contention that on the uncontradicted evidence plaintiff had abandoned his undertaking to sell these premises. It is urged in particular that we did not give consideration to the cases of Rigdon v. Estate of Strong, 126 Ill. App. 447, and Stone v. Holoney-Bennett Belting Co., 159 Ill. App. 366.

The Rigdon case involved a claim for commissions against the estate of Strong on account of the sale of the Owings Building in Chicago to Cyrus H. McCormick. This building was conveyed by deed of Strong and his wife on March 8, 1898. The claim had been disallowed upon the hearing in the Probate court and upon appeal to the Circuit court was also disallowed, and Rigdon then prosecuted a further appeal to this court. Rigdon under the statute was not a competent witness in his own behalf against the estate. Fetzner, McCormick's agent, testified that Rigdon first called his attention to the building and took him through it in the fall of 1897, and that he made several offers to Rigdon, none of which were accepted. There was no proof that Rigdon did anything after December, 1897, and, as already stated, the property was not conveyed until March 8, 1898. This court said that the record was barren of any evidence of actual dealings between Rigdon and Strong and that there was not even an implication of

ATTEST AND SUBSCRIBE UNDER
OF GOOD COUNTRY.

264 I.A. 888

JOHN A. TUDWILL
SPECIAL AGENT

ADDITIONAL CHARGES ON RECEIPTS

Defendant has filed a petition for a rehearing in which
it is stated that some time, we think, this court did not
give proper attention to the opinion filed in his contention
that on the uncontroverted evidence plaintiff had abandoned his
undertaking to sell these places. It is urged in particular
that we did not give consideration to the case of Higdon v.

Estate of Strong, 128 Ill. App. 447, and Strong v. Higgins,
128 Ill. App. 388.

The Higdon case involved a claim for commissions against
the estate of Strong on account of the sale of the Omega Building
and in Higdon v. Strong, 128 Ill. App. 447, was affirmed
by Strong and his wife on March 8, 1933. The claim had
been allowed upon the hearing in the Probate Court and upon
appeal to the Circuit Court was also affirmed, and Higdon then
procured a further appeal to this court. Higdon under the
statute was not a competent witness in his own behalf against the
estate. Strong, Strong's agent, testified that Higdon first
called his attention to the building and took him through it in
the Fall of 1927, and that he made several offers to Higdon, none
of which were accepted. There was no proof that Higdon did any-
thing after December, 1927, and, as already stated, the proceeds
were not conveyed until March 8, 1933. This court said that the
court was bound to up evidence of actual dealing between
Higdon and Strong and that there was not even an implication of

a contract of employment. That was the decisive point in the case. In its opinion, however, the court further said that it was apparent Rigdon had abandoned the employment, if it had existed.

It is clear that the controlling question in the case was the entire lack of proof of any employment whatsoever, and that what was said about abandonment was obiter dictum and wholly unnecessary to a decision of the case. Here, the fact of the employment was established by the evidence of both parties. If the defense of abandonment was to be relied on, it should have been established by affirmative proof. Moreover, in the Rigdon case the finding of the trial court which was entitled to the same weight as the verdict of a jury was in favor of defendant. Here, the verdict of the jury was in favor of the plaintiff.

The Stone v. Moloney-Bennett Belting Co. case is also distinguishable. There the plaintiffs had a contract of employment for the negotiation of leases. This contract had ended and signs of the plaintiffs upon the building had been removed. The plaintiffs claimed, however, that the defendant owner was obligated to pay commissions thereafter where it leased to tenants to whom plaintiffs had offered the premises prior to the expiration of their contract. The plaintiffs, however, offered no evidence to support their contention that they had an agreement which entitled them to commissions on these future leases. It appeared that in March prior to the expiration of plaintiffs' agreement with defendant, a party looking for a store observed plaintiffs' rent signs on the building and telephoned to plaintiffs about it, and that plaintiffs' salesman met the inquirer and showed him through the premises. The offer to lease was rejected, apparently because of the price. In May thereafter negotiations were again taken up with the owner, and on July 20th a lease was executed for a term

a contract of employment. That was the decisive point in the case. In its opinion, however, the court further said that it was apparent Rigdon had abandoned the employment, it is not ex-

cluded.

It is clear that the controlling question in the case was the entire lack of proof of any employment whatsoever, and that was said about abandonment was after Rigdon and wholly unnecessary to a decision of the case. Here, the fact of the employment was established by the evidence of both parties. If the defense of abandonment was to be relied on, it should have been established by affirmative proof. However, in the above case the finding of the trial court which was entitled to the same weight as the verdict of a jury was in favor of defendant. Here, the verdict of the jury was in favor of the plaintiff.

The case of Palmer-Hammett Reliance Co. case is also decided. There the plaintiff had a contract of employment for the negotiation of leases. This contract had ended and signs of the plaintiff's work was stopped but none returned. The plaintiff claimed, however, that the defendant owner was obligated to pay commissions thereafter where it leased to tenants to whom plaintiff had offered the premises prior to the expiration of their contract. The plaintiff, however, offered no evidence to support their contention that they had an agreement which entitled them to commissions on leases future leases. It appeared that in March prior to the expiration of plaintiff's agreement with defendant, a party located for a store observed plaintiff's rent signs on the building and determined to place signs there. That plaintiff's witnesses saw the sign and removed the same from the premises. The signs in question were removed, apparently because at the time. In May thereafter negotiations were again taken up with the owner, and on July 20th a lease was executed for a term

beginning September 1st. It was contended by the plaintiffs that it was a question for the jury to determine whether the transactions were continuous; but the opinion of this court stated that although plaintiffs were the brokers through whom the customer was originally brought to defendant's attention, there was a failure to rent for lack of agreement on the price, and although the premises were subsequently rented to the same party when the price was reduced, a jury would not be justified in finding that the plaintiffs were the procuring cause of getting the lease; that they had been completely negative in the matter for four months, and that although at the end of plaintiffs' contract of employment they gave to defendant a list of the names of prospective customers to whom they had submitted premises, on which they would expect commissions for future leases, if made, the list did not include the name of this lessee. It was therefore held as a matter of law that plaintiffs had completely abandoned the negotiations.

There is no such controlling evidence in this case. The question was submitted to the jury and we cannot say the verdict is manifestly wrong.

The petition for a rehearing is denied.

PETITION DENIED.

O'Connor, P. J., and McSurely, J., concur.

beginning September last. It was contended by the plaintiff's that it was a question for the jury to determine whether the transactions were continuous; but the opinion of this court seemed that although plaintiff's were the brokers through whom the contract was originally brought to defendant's attention, there was a holding in trust for lack of agreement on the price, and although the proceeds were subsequently rented to the same party when the price was reduced, a jury would not be justified in finding that the plaintiff's were the procuring cause of getting the lease; that they had been completely negative in the matter for four months, and that although at the end of plaintiff's contract of employment they gave to defendant a list of the names of prospective customers to whom they had submitted questions, on which they would expect commissions for future leases, it made, the list did not include the name of this lessee. It was therefore held as a matter of law that plaintiff's had completely abandoned the proposition.

There is no such controlling evidence in this case. The question was submitted to the jury and we cannot say the verdict is manifestly wrong.

The petition for a rehearing is denied.

WITNESSES:

G. O'Connor, E. J. O., and Secretary, E. J. O'Connor.

35583

HAROLD EPSTEIN,
Appellee,
vs.
JOHN R. GEARY,
Appellant.

86 7
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

264 I.A. 634

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by defendant from a judgment in the sum of \$14,458.56 entered upon the finding of the court in an action upon a promissory note. The note contained the power to confess judgment, and plaintiff under that power caused a judgment to be entered which was on the verified petition of defendant afterwards set aside, the order providing that the petition should stand as an affidavit of merits. The note upon which judgment was entered was dated December 26, 1929, and is on its face payable to bearer. It was executed and delivered as part of a transaction between defendant Geary and one Jerry R. Selman, and it was stipulated upon the trial that it was subject to the same defenses as it owned by Selman.

The defense set up in the petition was that about December 17, 1929, Selman loaned to defendant the sum of \$16,000 and charged a commission therefor in the sum of \$1600; that defendant executed two notes, the one sued on for \$13,200 and another for \$4,400, and executed trust deeds securing the same; that the aggregate of these notes included the amount actually borrowed by defendant from Selman and also the \$1600 charged by Selman as commission for making the loan; that in addition the notes bore interest at the rate of six per cent before maturity and seven per cent thereafter; that the interest upon the loan therefore exceeded seven per cent and was usurious and contrary to the statute.

The court heard the evidence. Defendant assumed the

burden of proving the allegation of usury as set up in his petition.

Geary, the defendant here, was prior to this transaction a defendant in the Superior court of Cook county in an action brought in equity against him by Selman to secure the specific performance of a contract for the conveyance of certain real estate. The decree of the Superior court dismissed the bill, but upon appeal by Selman to the Supreme court that decree was reversed and the cause remanded with directions to enter a decree in accordance with the prayer of the bill. Selman v. Geary, 334 Ill. 642. The opinion of the Supreme court in that case was filed April 20, 1929, and a rehearing denied June 6, 1929.

Selman testifies that the notes referred to in the petition were received by him in full settlement upon an accounting had pursuant to the decree entered in that case in the Superior court of Cook county on October 22, 1929, and that the same constituted full payment for the net balance due him from Geary on the exchange of properties. At the time of the transaction the parties signed a writing which appears in evidence as plaintiff's exhibit 1. It reads:

"Received of John R. Geary the sum of Fourteen Thousand Dollars (\$14,000) in cash and his Trust Deed in the sum of Seventeen Thousand Six Hundred Dollars (\$17,600) dated December 11, 1929, together with a trust deed securing the same, all being received as payment in full of an amount agreed upon to be due me upon the accounting provided for in the decree entered in the case of Jerry R. Selman vs. John R. Geary et al., Superior Court case No. 439613; and the same also being in full payment of the net balance due me on the exchange of properties as provided for in the contract referred to in the said cause, the deeds for same being exchanged and delivered this date.

It is understood and agreed between the undersigned and the said John R. Geary, that a final order be entered in said cause by the agreement of the parties hereto, acknowledging a full accounting between them and acknowledging a full settlement of all differences and payment in full by each to the other of all moneys due as between them, as well as the exchange of the deeds, all as provided in the said decree so entered on October 22nd, 1929.

(Signed) Jerry R. Selman.

Approved and agreed to:

(Signed) John R. Geary."

...of having the allegation of conspiracy as set up in his petition.

...the defendant here, was prior to this transaction a defendant in the conspiracy of local counsel in an action brought in equity against him by Nelson to secure the payment of a contract for the construction of certain

real estate. The decree of the Superior Court dissolved the bill, but upon appeal by Nelson to the Supreme Court that decree was reversed and the cause remanded with directions to enter a decree in accordance with the prayer of the bill.

...The opinion of the Supreme Court in that case was filed April 30, 1907, and a remanding writ issued June 3, 1907.

...Nelson petitioned that the decree rendered in the petition were reversed by him in 1911 petition was an account of the decree entered in that case in the Superior Court at St. Paul, Minn. on October 12, 1907, and that the same was affirmed by the Supreme Court for the balance due him from Nelson on the account of property. At the time of the transaction the parties signed a written contract in relation to the property.

...The contract at St. Paul, Minn. was as follows: (Exhibit A) ...

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Defendant produced a copy of a purported letter addressed to him, dated December 17, 1929. He says that the original was prepared and signed by Selman simultaneously with the execution of these notes and trust deeds; that the original was lost while in his possession. This writing purports to give a correct description of these securities, and says, "Said sum of Seventeen Thousand Six Hundred Dollars (\$17,600.00) is made up,-- Sixteen Thousand Dollars (\$16,000.00) for balance due me on exchange of properties and One Thousand Six Hundred Dollars (\$1,600.00) covering commission on extension of time of payment from date to January 25th, 1931." It also states that Selman agrees to retain the securities in his possession or control up to July 1, 1930, and that Geary is to have the privilege of paying the principal and interest notes at any time before maturity. It adds:

"In the event that you pay said principal sum and interest on or before April 1st, 1930, then I agree to allow you a rebate on said principal note of One Thousand Six Hundred Dollars (\$1,600) being the entire amount of commission. In the event that you pay up said note after April 1st, 1930, but on or before July 1st, 1930, then I agree to allow you a rebate of Eight Hundred Dollars (\$800.00) or one-half of the amount of commission charged."

The evidence is indefinite as to what is meant in the writing by the term "commission." ^{which} Whether it was some item concerned an amount which one or the other party was obligated to pay in connection with the exchange of the properties, or some loan connected therewith, is left wholly indefinite. As already stated, the burden of proof was upon defendant to establish the defense of usury. Oral evidence was admissible for the purpose of proving that usury existed. Clemens v. Crans, 234 Ill. 215. In order to establish that defense, it was necessary for defendant to show that the commission referred to in this writing was a charge made in favor of Selman and to be received by him from defendant "for the loan forbearance or discount" of money, goods or a thing in action. Smith-

Hurd's Ill. Revised Statutes, 1929, chapter 74, sec. 5, p. 1740. Such facts were not established here. Defendant testified that the trust deed stated that the notes were given to secure the purchase price of the premises, Selman testified that the notes were received by him in "full payment for the net balance due me from Geary on the exchange of properties."

We do not doubt that taking a greater rate of interest than prescribed by statute under the guise of commission constitutes usury, as was held in Shirley v. Welty, 19 Ill. 623, cited by defendant. Nor do we question that when in the sale of real estate for a cash price which has been theretofore fixed and agreed upon, the seller requires the buyer to assume an indebtedness greater than the agreed price plus interest, such agreement is usurious, as was held in Mitchell v. Griffiths, 22 Mo. 515, and Rosen v. Rosen, 169 Mich. 72 (123 N. W. 559), and other cases also cited and relied on by defendant. These are not the facts here. On the contrary, the trial court expressly held (as the evidence justified) that the note sued on and the trust deed securing the same "having been given as part purchase price of the premises described therein, the defense of usury cannot be maintained."

The evidence being insufficient to establish the affirmative defense interposed by defendant, the judgment for plaintiff is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

and the fact that the note was given to secure the purchase price of the property, the balance of the note was received by him in full payment for the balance due on the purchase price of the property.

It is not denied that the note was given to secure the purchase price of the property, the balance of the note was received by him in full payment for the balance due on the purchase price of the property.

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Opinion Filed February 1-1932.

87 Abstract

264 I.A. 634²

General No. 8543

Agenda No. 8

October Term, A. D. 1931

FRANK T. O'HAIR, Plaintiff in Error,

vs.

THE CLEVELAND, CINCINNATI, CHICAGO AND
ST. LOUIS RAILWAY COMPANY,

Defendant in Error.

Error from Edgar County.

ELDREDGE, J.

We adopt the statement of the case of counsel
for defendant in error as follows:—

“This was an action to recover \$1500.00 alleged damages from the death of four steers and injury to thirty-one others in a shipment from the U. S. Stock Yards, Chicago, Illinois, February 27, 1930, in N. Y. C. 21795 consigned to plaintiff at Conlogne, Illinois. The record shows the shipment arrived at Paris at 10:00 A. M., February 28th and there was testimony on the part of the plaintiff that the car in question was seen in the yards at Paris about 8:30 or 9:00 A. M. The record further shows that the car left Paris on train 69 at 5:00 P. M. and that train 69 was the first available train on which the cattle could have been moved to Conlogne, with the exception of a through train from New York to St. Louis which picks up no freight whatever between Indianapolis and St. Louis. Plaintiff's witnesses testified that they had seen other trains pass prior to train 69. The correct records of the train movements on this day were in evidence and no other trains moved. The testimony of plaintiff was to the effect that because the cattle remained in the car at Paris until 5:00 P. M. on February 28th and because the car was placed ahead of the engine and pushed from Paris to Conlogne, a distance of about six miles, the cattle contracted pneumonia as a result of which five cattle died and thirty-four were sick and lost weight. The facts were submitted to a jury and the jury returned a verdict for the defendant. Motion for a new trial was overruled and judgment was rendered on the verdict in bar of the action and for costs, from which judgment error was duly prosecuted to this Court.”

It is contended that train sheets made up of records supplied to the train dispatcher by agents along his division showing movement of trains are incompetent evidence. We have

already held otherwise in **Orchards v. N. Y. C. & St. L. R. R. Co.**, Ill. App.... Aside from this question no other is involved except questions of fact which were for the jury to determine. They heard and saw the witnesses and rendered their verdict for the defendant in error which was approved by the trial judge.

We find no reversible error in the record and the judgment of the Circuit Court is affirmed.

Opinion filed February 1, 1932.
Abstract

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264 I.A. 634³

General No. 8547

Agenda No. 11

October Term, A. D. 1931

CLAYTON C. CLEMENTS, et al., Appellees,

vs.

REBECCA LIND, Appellant

Appeal from Circuit Court, Christian County.

ELDREDGE, J.

This cause has been certified to this Court for consideration by the Supreme Court. On the second day of May, 1924, Phillip Clements and his wife conveyed to their nine children 104½ acres of farm lands in the County of Christian and also Blocks 1 and 2 of Phillip Clement's Second Addition to the Town of Stonington and the east half of Blocks 1 and 2 in Phillip Clement's First Addition to the Town of Stonington, last said mentioned tracts consisting of 7.63 acres and also situated in Christian County. The sole right of occupancy and to the rents and profits of the above described premises were reserved by the deed to remain in Phillip Clements during his natural life and in the event his wife survived him the right of occupancy and possession and to the rents and profits thereof after the death of said Phillip Clements should vest in and belong exclusively to his said wife during the balance of her natural life. Phillip Clements died February 19, 1930, the death

of his wife having preceded him, and on July 22, 1930 six of his children as complainants brought their suit for partition of the above mentioned premises making the other three children, to-wit: Rebecca Lind, Ruby F. Holstein and Clara N. Roberts, together with one C. F. Buffington, who was a tenant, parties defendant. On September 27, 1930 the bill was amended to show that since filing the bill all the parties interested therein and owners of the undivided interests in said land had sold a portion of the same comprising an area of a little over nine acres, the description of which is set out by metes and bounds and the bill prays that that portion so sold be stricken from the bill. On February 23, 1931 the bill was again amended by dismissing the same as to the defendant Buffington whose lease as tenant had expired, and by changing the defendants Ruby F. Holstein and Clara N. Roberts from defendants to complainants, said Clara N. Roberts suing by and through her legal guardian and next friend Asa M. Clements. The amended bill further represents that said defendant Rebecca Lind has taken possession of all of said premises without any right or authority from the complainants and is seeking to farm the same for the ensuing year without a lease and without authority and contrary to the objections of the complainants and prays that a restraining

order be issued against her and that some proper person be appointed for the purpose of leasing said premises and collecting the rents and profits arising therefrom during the pending of the litigation. On March 19, 1931 Rebecca Lind filed her answer to the bill as amended in which she denies that said sale of nine acres as alleged in said bill was ever completed and avers that the lease of said Buffington expired March 1, 1931 and that she had been in possession of all of the real estate described except forty acres in the north end thereof which was in the possession of Otis Lind as a tenant of the complainants and herself and that he holds possession of said real estate by operation of law and is a necessary party to this proceeding; that Buffington surrendered possession of said farm to her as she is the only owner of said land living in the State of Illinois and that in order to protect her interests as well as the interests of the complainants she leased said lands to Otis Lind for the year terminating March 1, 1932 and that said tenant entered into possession of said lands by virtue of said lease and has expended a large amount of labor and money preparing said lands for the planting of crops for the season of 1931.

The bill was again amended by again inserting the property which was stricken from the bill by the previous amendment. A hear-

his wife until the answer was filed and the evidence further shows that the leases were not made in good faith but to hamper and delay the partition suit so as to force the complainants to concede certain portions of said premises to Rebecca Lind. In any event, Otis Lind was not a necessary party because his interest, if any, accrued after the partition suit was brought and while it was pending in litigation.

The decree of the Circuit Court is affirmed.

Opinion Filed February 1-1932
abstract

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264 I.A. 634⁴

General No. 8571

Agenda No. 29

October Term, A. D. 1931

PEOPLE OF THE STATE OF ILLINOIS on the relation of and in the name of OSCAR NELSON, Auditor of Public Accounts of the State of Illinois,

vs.

THE URBANA BANKING COMPANY, Urbana, Champaign County, Illinois, a Corporation,

On Appeal of ANNA O'CONNOR, Intervening Petitioner, Appellant.

Appeal from Circuit Court, Champaign County

ELDREDGE, J.

March 12, 1930 Roger F. Little, Receiver of the Urbana Banking Company filed a petition in the Circuit Court of Champaign County in the suit wherein he was appointed as such Receiver to have the Court adjudge the rights and priorities of certain parties claiming to own certain notes secured by three different trust deeds executed by one Oscar Hudson, certain of which notes secured by each trust deed being in the possession of the petitioner as the Receiver of the Bank. On March 26, 1930 Anna O'Connor, appellant, filed her intervening petition in which she claims ownership of note No. 7 for \$2500.00 and note No. 12 for \$2000.00 in the Oscar Hudson trust deed loan of \$50,000.00 of September 4, 1929 claiming to have purchased said notes on October 12, 1929 before the Bank was closed

and paid therefor the sum of \$4500.00 by endorsing a certificate of deposit which she had in said Bank and delivering the same to Edwin E. Rea then Vice-President of the Bank. The only question involved on this appeal is one of fact as to whether any contract of sale of these notes was ever consummated between appellant and the Bank through Rea. The cause was referred to the Master in Chancery to take the proofs and report his findings of law and fact. The Master made the following findings as to the claim of appellant which were approved by the Court:—

“7. The Master further finds that the intervening petitioner, Anna O'Connor on October 15, 1929, was owner of a certificate of deposit No. 5256, issued by the Urbana Banking Company, dated September 6, 1929, for the sum of \$4,500.00, due three months after date with interest at 3 percent per annum and on said date had a conversation with one, Edwin E. Rea, then the Vice-President of said bank, with reference to the purchase of Notes Nos. 7 and 12 for \$2,500.00 and \$2,000.00 each, respectively, dated September 4, 1929, signed by the said Oscar Hudson, the same being two of the notes included in the \$50,000.00 issue secured by a trust deed recorded in Volume 296 of Trust Deeds on page 231, deed records of Champaign County, Illinois.

“That the said intervening petitioner for some time prior thereto had been a customer of said bank and had a safety deposit box therein and that the key to the said safety deposit box was by the said Anna O'Connor left in the care and custody of said Urbana Banking Company. That said certificate of deposit so owned by intervening petitioner as aforesaid had been in said safety deposit box prior to October 15, 1929. That on said date she endorsed said certificate of deposit and left the same with the said Rea with the understanding and agreement that she would exchange the same for said Notes Nos. 7 and 12 aforesaid provided he, the said Rea, did not hear further from her sometime later in the afternoon of said day. That said certificate of deposit and said notes were left lying on the desk of the said Rea and remained there until later in the afternoon when the said Rea received a message by telephone from one, Katherine Callahan, in which she stated that Miss O'Connor would not be down to the bank that afternoon and that thereafter the said certificate of deposit was by the said Rea returned to the safety deposit box of the said Anna O'Connor and the said notes were placed among the other assets of said Urbana Banking Company and remained in said bank from then on until the closing of said bank.

"8. The Master further finds that said intervening petitioner at the time of said conversation in the bank with the said Rea had not definitely concluded whether or not she would purchase said notes and that she never, at any time thereafter, advised the said Rea as to whether or not she would accept said notes in exchange for her said certificate of deposit. That the said Rea had no instructions from the said O'Connor to deliver said notes to the deposit box of said Anna O'Connor and to take up said certificate of deposit and that the title and possession of said notes never, at any time, passed to the said Anna O'Connor and neither did the title and possession of the said certificate of deposit pass to and become the property of the said Urbana Banking Company, * * *

"10. The Master further finds that said intervening petitioner failed to prove the allegations of her said petition by sufficient and competent evidence and that said intervening petition should be dismissed for what of equity."

The Master saw and heard the witnesses and without discussing the evidence in detail we are of the opinion that the evidence fully sustains his findings that there never was any actual sale of the notes to appellant.

The decree of the Circuit Court is affirmed.

Opinion Filed February 1-1932.
abstract

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A

264 I.A. 635¹

General No. 8548

Agenda No. 12

October Term, A. D. 1931

O. N. PIPER, Defendant in Error,

vs.

AMANDA McDANIELS and LILLIE HOUSE, Plain-
tiffs in Error.

Writ of Error to County Court of Sangamon County.

SHURTLEFF, J.

This writ of error brings up for review the ruling of the County Court of Sangamon County in refusing to open a judgment in the sum of one hundred seventeen dollars and for leave to plead upon the petition of plaintiffs in error.

Plaintiffs in error have filed the record, with abstracts and briefs in this court. Defendant in error has filed no briefs. In accordance, therefore, with rule one of this court the judgment of the County Court of Sangamon County is reversed **pro forma**, and the cause remanded to that court with directions to grant the petition of plaintiffs in error.

Reversed and remanded with directions.

Opinion Filed February 1-1932.
abstract

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A

264 I.A. 6352

General No. 8552

Agenda No. 15

October Term, A. D. 1931

ANNA MARIE PAUL by Charlie Paul, her father and
next friend, Defendant in Error,

vs.

LESLIE MARTIN, Plaintiff in Error.

Writ of Error to Circuit Court of Sangamon County.

SHURTLEFF, J.

This is a writ of error from a judgment for four thousand dollars entered in the Circuit Court of Sangamon County, in favor of Anna Marie Paul, by Charlie Paul, her father and next friend, defendant in error (plaintiff below), and against Leslie Martin, on the sixth day of July, A. D. 1931, in an action of trespass on the case brought by Paul against Martin to recover damages on account of an injury sustained by her on the seventh of August, A. D. 1929, wherein the said Anna Marie Paul ran into the left rear fender of an automobile owned and being driven by the said Leslie Martin.

The amended declaration upon which this case was tried contained one count. It alleged that on the seventh of August, 1929, in the daytime, the plaintiff was a minor child of four years of age and therefore incapable of exercising care and caution for her own safety, and that while she was lawfully on a certain public highway known as Route No. 25 and also known as the Beardstown road, in the County of Sangamon and State of Illinois, which said road extended approximately east and west about six miles west of Springfield in said county, the defendant was then and there driving an automobile and that the defendant so negligently and carelessly drove said automobile that the same came into collision with the plaintiff, who was then and there lawfully on said public highway, and that in consequence of such negligent driving the said Anna Marie Paul was struck by said automobile, and

was thrown with great force and violence to and upon the pavement of said highway and that divers bones of the plaintiff's body were broken and her skull was fractured and her head, face, body, and back bruised, cut and lacerated, in consequence of which she became sick, sore and disordered and suffered much pain and so remained from thence hitherto and sustained divers and serious permanent injuries to her damage of the sum of fifteen thousand dollars. To this amended declaration the defendant filed a plea of not guilty.

There was a trial by jury and a verdict for defendant in error in the sum of six thousand dollars. On a motion for a new trial the court compelled defendant in error to enter a remittitur in the sum of two thousand dollars and thereupon the motion was overruled and judgment entered against plaintiff in error in the sum of four thousand dollars. Plaintiff in error brings the record to this court for review.

On the trial in the lower court, sufficient evidence was presented by defendant in error to warrant the jury in finding that plaintiff in error was guilty of negligence, which resulted in the injury to defendant in error.

The defendant in error, Anna Marie Paul was four years of age at the time of the injury and prior to the injury was a strong, healthy girl. After the accident she was taken to the Springfield hospital, unconscious. She remained in the hospital three and a half weeks, after which time she was taken home. She was unconscious for about five days, and delirious for about a week. She sustained a fractured skull in the temporal region, had contusions about the body, an injury to the right ankle and right foot, the nails came off the second and third toes and she had a laceration on the outer side of the left ankle. The fracture went through the inner and outer tables of the skull. She was attended by Dr. Otten, who testified as her

witness. He saw her every day she was at the hospital, seeing her night and morning the first four or five days and, after that, once a day. While in the hospital he gave her first aid, put a drain in the wound to the scalp, sutured it, put ice packs to the head and put her to bed to keep her as quiet as possible, dressing the wound as often as necessary. She was restless and was given some opiates.

After she left the hospital the doctor treated her from time to time for four or five months, during which time she had an injury to the right ankle and foot. She still has a limp and weakness in the right foot, which makes her right foot turn in when she runs and, if running fast, she may fall. This is due to an injury on the right side of her head. The last time she was examined by the doctor was on May eleventh, before the trial. She was unable to walk for eight and a half weeks after the accident, according to her mother.

Dr. Otten further testified that he thought,—“there was such a severe injury to her head with the concussion that there is always some hemorrhage, may be just a hyperemia, and there may be some slight hemorrhage, which will be absorbed later. The skull was never opened,” as the doctor did not think it wise.

The principal contention in this case arises over the testimony of Dr. Otten, especially as to what may be the outcome of these injuries. We present the testimony of Dr. Otten as objected to by plaintiff in error, as follows:

“There is something wrong with the girl’s foot now; I saw her stamping around the court room while the jury was out and saw her foot turn in, and she would swing her foot. She has not the full function and use of that foot now. She runs, but she throws her foot and she throws it in and she limps a little and she will stumble easily. With reference to her foot, it may remain as it is and it may become worse.”

Dr. Otten testified that he—“does not expect her present condition to get much better, but it might become worse; that epilepsy sometimes follows traumatism and it often comes on after a fractured skull; that in a fractured skull, there would naturally be some callous formation and the excessive formation of callous may cause a meningeal irritation with a chronic thickening of the bone after a contusion, and this pressure on the motor area cause an irritation and that is the cause of epilepsy. She may develop—after such an injury she may later develop chronic headaches and she might even get a meningitis or she might develop insanity.”

On questioning by the court he testified as to probabilities and produced some sheets from which he had been reading—quotations from Rose & Carliss—without showing in any manner what the book was. He testified it was his opinion and also their opinion and what they find from the studies of such work. No testimony was produced showing who Rose & Carliss were or upon what subject they were writing and excerpts from their writings would not be competent evidence. It was not shown that Dr. Otten had had any experience with such injuries and the results that followed from them.

The rule is aptly stated in the case of **O'Donnell v. Snyder**, 231 App. 581, a case from this district. There two doctors for the plaintiff were permitted to testify as to the probable and possible results from an injury. This the court held was error. Concerning this, Mr. Presiding Justice Heard, on page 582 of the opinion, said: “Upon the trial Drs. Finch and McKinney expert witnesses for plaintiff, were permitted to testify as to probable and possible results

from the injury. This was error.

“In 17 Cyc. 226, it is said: ‘The judgment of an expert must be more than a guess. A tribunal that is called upon to decide a definite issue of fact by the use of the reasoning faculty cannot be aided where no mental certainty is shown by a witness. That a judgment is based upon conjecture shows that little or no aid can be given the jury on this point by witnesses, however skilled, and therefore evidence of it is rejected.’

“In Webster’s International Dictionary the word ‘probable’ is defined as follows: ‘Having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely.’ In **Chicago City Ry. Co. v. Henry**, 62 Ill. 142, it was said: ‘It is true, no one can determine with absolute certainty what the result of such an injury might be; but something more than mere conjecture, mere probabilities, should appear to warrant the giving of damages for future disabilities that may never be realized.’

“In **Lyons v. Chicago City Ry. Co.**, 258 Ill. 75, it was said: ‘While it is often difficult to draw the line between legitimate inferences and bare conjecture, only such inferences may be drawn as are rational and natural (14 Encyc. of Evidence 99, and cases cited). Mere surmise or conjecture is never regarded as proof of a fact and the jury will not be allowed to base a verdict thereon (14 Encyc. of Evidence 76, and cases cited). No one is permitted to testify to what he has never learned, whether it be ordinary or scientific facts (**Elliott v. Van Buren**, 33 Mich. 49.) If a witness has not sufficient and adequate means of knowledge his evidence should not be considered (Starkie on Evidence, 10 Amer. ed. 172). A surgeon may testify as to the nature of a wound and as to the effect or consequences which may be reasonably expected to happen—not mere speculative or possible (1 Wharton on Evidence, Sec. 441; Jones on

Evidence, 2d ed. Sec. 378; 12 Amer. & Eng. Encyc. of Law, 2d ed. 447, and cases cited). If it form a proper basis for recovery it is necessary that the consequences relied on must be reasonably certain to result. They cannot be purely speculative.' In **Fellows-Kimbrough v. Chicago City Ry. Co.**, 272 Ill. 76, it was said: 'Merc surmise or conjecture cannot be regarded as proof of an existing fact or of a future condition that will result. Expert witnesses can only testify or give their **opinion as to future consequences** that are shown to be reasonably certain to follow.' To the same effect are **Amann v. Chicago Consol. Traction Co.**, 243 Ill. 263; **Lauth v. Chicago Union Traction Co.**, 244 Ill. 244; **Elward v. Illinois Cent. R. Co.**, 161 Ill. App. 630; **Lisenbury v. St. Louis & S. Ry. Co.**, 184 Ill. App. 395; **Eilers v. Peoria Ry. Co.**, 200 Ill. App. 487.

"We are of the opinion that the testimony of these experts fell far short of the reasonable certainty required by law."

The admission of this testimony was error and highly prejudicial to plaintiff in error. It is contended by defendant in error, however, that the admission of the testimony, which merely went to the amount of the damages, was cured by the remittitur, citing: **Amann v. Chicago Traction Co.**, 243 Ill. 267; **Wabash Railway Co. v. Billings**, 212 id. 37; and **Feldman v. Chicago Railways Co.**, 289 id. 36.

In **Amann v. Chicago Traction Co.**, *supra*, where a similar error was committed, the court held: "Notwithstanding these errors we are of the opinion that the judgment should not be reversed. The errors did not in any manner affect the question of the liability of the defendant, in which case a remittitur would be of no avail to obviate them, (**Wabash Railway Co. v. Billings**, 212 Ill. 37,) but they related only to the amount of damages. While the defendant had a right to the judgment of the jury as to the amount of damages on legitimate evidence, it has frequently been held that an error affecting damages, only, may be cured by a remittitur. Whether the remittitur required by the trial court would cure errors of this character on a question

of actual damages or not, we are satisfied that any jury to whom the evidence in the case might be presented would assess damages equal to the amount of the judgment."

Amann v. Chicago Traction Co., *supra*, is based upon **Wabash Railway Co. v. Billings**, 212 Ill. 37, in which there was a fair trial, without error, but the court considered the verdict excessive, and held: "But a remittitur will not cure an error which influenced the finding of a jury on issues of fact."

In **Feldman v. Chicago Railways Co.**, 289 Ill. 36, the court held: "Defendants in error also complain of the admission of testimony offered by plaintiff in error concerning the danger of a certain operation, upon the ground that such operation was not contemplated, urging that under the rule recognized in this State the dangers of an operation not contemplated are not elements of damages. We are of the opinion, however, that in view of the fact that the permanency of the plaintiff's injury is not disputed the testimony could only affect the amount of the verdict, and that under the circumstances of this case the error complained of should not, of itself, have reversed the judgment."

So much for the authorities that a remittitur will cure an error upon the admission of improper matter to the jury where it cannot be determined to what extent the improper matter influenced the verdict of the jury. A court may always require a remittitur where there is no error and the verdict is considered excessive, and where the damages proven by error may be separated from the other amounts found. The greater weight of authority is, that where the damages cannot be separated and improper matters have been submitted to the jury, a remittitur does not cure the error, (**C. & E. I. R.R. Co. v. Donworth**, 203 Ill. 197; **Lauth v. Chicago Union Traction Co.** 244 id. 253; **Lyons v. Chicago City Ry. Co.**, 258 id. 83; **Sandy v. Lake Street El. R. R. Co.**, 235 id. 197.)

In *Lyons v. Chicago City Ry. Co.*, *supra*, a case similar to the one at bar, the court said: "What effect this speculative, conjectural testimony had on the jury it is impossible to state. Defendant in error was a physician and was insured in two accident companies providing for indemnity for both complete and partial disability. He was willing to settle with one of the companies on the basis of seven weeks' disability and with the other on ten weeks. Everyone particularly dreads injuries to the skull. The jury brought in a verdict of seven thousand dollars. The Appellate Court, after considering the evidence as to the extent of the injury, required a **remittitur** of two thousand five hundred dollars. It may be that this improper evidence accounted for a large part of the verdict. Such an error in the admission of evidence is not susceptible of computation, and even a **remittitur** cannot cure it. *Lauth v. Chicago Union Traction Co.*, *supra*; *Chicago City Railway Co. v. Henry*, 218 Ill. 92; *Shaughnessy v. Holt*, 236 id. 485."

We do not hold that the damages in this case after the **remittitur** are excessive, but we do hold that, considering the nature of the testimony erroneously admitted, neither the Circuit Court of Sangamon County nor this court, under the cases cited, has the right to fix the amount of the damages. No one can say, in view of the testimony of Dr. Otten, that the injury may result in epilepsy, or that it may result in insanity, or what effect it had on the jury. The true inquiry should be as to "the effect or consequences which may be reasonably expected to happen, not merely speculative or possible."

Some minor defects are pointed out in the form of defendant in error's instructions. Such as they are will be corrected upon another trial.

For the reasons stated, the verdict and judgment of the Circuit Court of Sangamon County is reversed and the cause remanded for another trial.

Reversed and Remanded.

Opinion filed February 1-1932

abstract

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17

264 I.A. 685³

General No. 8555

Agenda No. 18

October Term, A. D. 1931

JAMES ROBERT COTTON, by ALVA COTTON, his
next friend, Appellee,

vs.

ESTHER BALSLEY, Appellant.

Appeal from the Circuit Court of Vermilion County
SHURTLEFF, J.

This suit was instituted for the recovery of damages for an injury received on Jackson Street, in the City of Danville, by appellee, a child eight years of age, who was struck by an automobile, driven by the appellant, Esther Balsley. The declaration charged general negligence on the part of appellant. There was a verdict and judgment in the sum of nine hundred dollars and appellant has appealed.

The circumstances surrounding the injury, as shown by the evidence, were as follows: Jackson street in the City of Danville runs north and south. It is thirty feet in width between curbs. The accident happened in the middle of the block at a place which is not a street intersection or cross walk. On the east side of Jackson Street the high school grounds are situated. The plaintiff, James Robert Cotton, lived with his parents on the west side of Jackson near the middle of the block. On the evening in question he and six or seven other children were playing hide-and-go-seek, the base being located at a tree in the front yard of the neighbor next door north. Appellee, with his brother, Freeman, crossed over to the east side of Jackson Street and hid behind some shrubbery in the school yard. An entertainment was going on at the high school and a double row of automobiles was parked on the east side of Jackson Street and on the west side one car was parked in front of the Cotton residence. The accident happened on May 31, 1930, about eight-thirty o'clock p. m. The description given by the witnesses is that the cars on the high school side were parked about as close as they could get. When the

boy who was "it" stopped counting, James jumped up from behind the bushes and ran across the street so as to get into the base free. He had to pass between the two rows of parked cars before he was in the clear and although he says he looked both ways, he did not see this automobile until after it struck him. He says that he was running fast and did not quite get over, and that "he was near the curb on his side of the street when struck." The automobile was being driven by the appellant, Esther Balsley, a niece of the owner of the car, upon a social errand of her own, she having the privilege to use it whenever she wished. She had taken some friends, a Mrs. West and her daughter, Dorothy, out to an inn some three miles from the City of Danville, where they had supper. It was getting dark when they started for the city, and the automobile lights were then turned on, and after reaching town and driving on several streets they came to the intersection of Fairchild Street with Jackson, where they turned to go south in Jackson, and had gone about two-thirds of the length of the block when the accident happened. Miss West sat on the front seat to the right of the driver and the mother on the back seat. Miss Balsley was an experienced driver, and all three were accustomed to riding in automobiles, and each fixes the speed at ten miles per hour. None of the three were aware of the presence of appellee until the collision had occurred, and the testimony is undisputed that the driver immediately put on the brakes, and that the car stopped in less than its length. In fact, it happened so quickly that the driver could not say whether the boy came from the west or from the east side of the street. There was a street light at the north end of this block, and one at the next intersection to the south, and the high school building was lighted up. The driver of this car met another car going north, which had just passed when the accident occurred. The three occupants of the car all testify that the headlights were burning. This testimony, it is claimed, cannot be said to be overcome by any other evidence in the case. Freeman Cotton, brother of

plaintiff, says, "the lights were off when she hit him, and then she turned them on again." Eston Cotton, an uncle of plaintiff, who ran out on hearing the screams, says that when he came out the lights were not burning. All other witnesses for the plaintiff give no testimony on the point. No complaint was made as to the manner of defendant's driving, and all that can be said is that she did not see him in sufficient time to stop her car before it struck the boy. It is undisputed that this accident occurred at a place which was not usually travelled by pedestrians. An ordinance of the City of Danville was introduced by the defense which forbids the crossing of pedestrians between cross streets.

Freeman Cotton, brother of appellee, ten years of age, testified for appellee that he warned appellee to look out before crossing the street and that it was sufficiently light so that the brother in the school yard, "could see the automobile the lady was driving by the street light." Freeman testified that he could not see a car coming from the north or from the south. He testified, "I was just peeking over the bushes when the car struck 'Jimmie.' I could see the automobile that the lady was driving by the street light. 'Jimmie' was running fast when he started to run across the street."

Appellee testified: "I started for the base before Freeman. He told me to look out for the cars. I had to pass two rows of cars before I was out in the clear. Where I stopped and looked was where I had got past the two cars. Then I started to run across the street, running fast, and I didn't quite get across. Never saw the car at all until after it struck me."

Virginia Herschler testified for appellee: "Was in our yard when this happened, close to the front sidewalk. Saw the car hit 'Jimmie.' We were playing hide-and-go-seek and 'Jimmie' and his brother hid across the street and when he came back he looked both ways, didn't see the car and it just hit him. I don't know whether the car had lights." She saw the car hit appellee, but testifies that

appellee looked in both directions and could see nothing.

Appellant was driving at not to exceed ten miles an hour. There was a street light burning at each end of the block and the school house was lighted. Appellant testified that her lights were burning, and had not been changed since she turned them on, when leaving the inn three miles out. She states that the lights are the kind that tilt down. Appellant further testified that she did not see the boy until he was struck, and that: "As we came south in front of the Cotton or Herschler house, there was one car coming toward us. It had just passed us when this accident happened; do not know who was in that car. It had lights shining as it came toward me; do not know whether that car stopped or not."

This testimony is not rebutted or contradicted in any manner.

Appellant contends that there is no testimony in the record tending to show that appellant was negligent or that appellee exercised any care, for a boy of his age, for his own safety; that the verdict is against the manifest weight of the testimony and that the Court erred in refusing appellant's first instruction.

If appellant's testimony is true, that a car going north, which would be between appellant's car and the boy, had just passed her, then there would be no testimony in this record establishing any negligence on the part of appellant, except the failure to have lights. The witnesses to the accident for appellee were all children, eight and ten years of age, and their testimony on many matters is not persuasive. None of them mention the car going north, though they could see it as well as they could see the car of appellant going south, and none of them denied that the car did go north just as appellant testified.

The testimony of Freeman Cotton, ten years old, Virginia Herschler, thirteen years old, and Margrete Jackse, nine years old, that appellee came through the two lines of cars on the east side of the street, that then appellee looked in both directions and could see no

cars, has too much the color of a rehearsed tale to impress this Court with its genuineness. How could they know what "Jimmie" saw? The only testimony in this case tending to show negligence on the part of appellant was the testimony that there were no lights burning on her car. Appellee's and Freeman Cotton's testimony can be explained only on the theory that there was a car going north just at the time appellee started to cross the street and the boy ran across just behind this car, and hence neither of them saw appellant's car going south until appellee ran into it. On this theory, their testimony was truthful that neither of them saw appellant's car approaching from the north and while the northbound car was "passing," neither of them saw a car "approaching" from the south. The most that can be said in this case is that there was no proof of negligence in this case against appellant except some proof that appellant violated the statutory law of the road as to having lights burning upon her car, which is strongly contradicted.

The verdict and judgment are manifestly against the weight of the evidence.

Appellant complains that the Court erred in refusing to give her first instruction, as follows: "If you find from the evidence that the place where this accident occurred was on Jackson street, and that plaintiff, James Robert Cotton, was then and there crossing said Jackson Street from east to west, at a place which was not a public crossing, and not a usual place of crossing.

"Then you are instructed as to the law applicable to such a situation, that the person about to cross the street at the place must use more care than if the accident occurred at a regular or usual cross-walk.

"And further, you are instructed as to the driver, that he or she is not required to have the automobile between such crossing under instant control, nor is such driver required to anticipate that some person is about to cross said street at that place, unless

the evidence shows that the driver had notice thereof, or by ordinary diligence might have known that such was the case." The instruction stated the law applicable to this case and should have been given.

For the reasons stated the verdict and judgment of the Circuit Court of Vermilion County are reversed and the cause remanded for another trial.

Reversed and remanded.

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STATE OF ILLINOIS.
APPELLATE COURT
FOURTH DISTRICT.

FILED

FEB 1 1932

OCTOBER TERM, A. D. 1931.

Robert S. Nov
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 12.

AG. NO. 19.

264 I.A. 385⁴

T. G. STAFFORD, :
Defendant in Error, : ERROR TO
V. :
H. E. KIMMEL, : FRANKLIN CIRCUIT
Plaintiff in Error. : COURT.

BARRY, P. J. - This case was tried on the regular setting, in the absence of plaintiff in error, and there was a verdict against him for \$1118.40. He was his own attorney and filed a motion for a new trial on the grounds that the evidence was insufficient to prove a case and that the cause was set for trial without his knowledge. He has not argued the latter ground and it must be considered as waived. At any rate it was his duty to know when the case was set for trial and the fact that he expected the clerk to notify him of the setting was not a valid excuse. The Court rendered judgment on the verdict.

Plaintiff in error contends that the evidence is insufficient to sustain the verdict. In a jury trial, if it is desired to save for review the question of the sufficiency of the evidence to sustain the verdict, the losing party must make a motion for a new trial, and, upon its being overruled, except to such ruling, and include such motion, the order overruling the same and his exception thereto, together with the evidence, in the bill of exceptions. Yarber v. C. & A. Ry., 235 Ill. 589. People v. Gabrys, 329 Ill. 101. The bill of exceptions does not contain the order of the Court overruling the motion for a new trial or an exception thereto and for that reason the question as to whether the evidence

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FEB 1 1933

DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

Handwritten initials or signature.

AG. NO. 12.

AG. NO. 12.

33-1-107

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U.S. DEPT. OF JUSTICE
WASHINGTON, D.C.
FEB 1 1933

BARRETT, V. J. - This case was tried on the regular setting, in the absence of plaintiff in error, and there was a verdict against him for \$1118.40. He was his own attorney and filed a motion for a new trial on the grounds that his witness was incompetent to give a case and that the cause had not for trial without his knowledge. He has not argued the latter ground and it has been considered as waived. At any rate it was his duty to know when the case was set for trial and the fact that he expected the clerk to notify him of the setting was not a valid excuse. The Court rendered judgment on the

plaintiff in error contends that the evidence is insufficient to sustain the verdict. In a jury trial, it is sufficient to save for review the question of the sufficiency of the evidence to sustain the verdict, the finding being made a matter of a new trial, and upon its being overruled, except for such error, and finding made correct, the case continuing on the same day. Exception thereto, together with the evidence, in the bill of exceptions, Yerkes v. U.S.A., 225 Ill. 200. People v. Gorman, 225 Ill. 101. The bill of exceptions does not contain the order of the Court overruling the motion for a new trial or an exception

is sufficient to support the verdict has not been preserved and cannot be considered.

It is argued that the declaration is so defective that it does not state a cause of action, but no such error was alleged in the motion for a new trial, nor does it appear in the assignment of error. If plaintiff in error thought the declaration was so defective that it would not support the judgment, that question could have been presented to this Court by a proper assignment of error, even though a demurrer to the declaration was overruled and he had pleaded to the merits. *Tykalowicz v. Metropolitan Life Ins. Co.*, 249 App. 280. No such error has been assigned and that question is not before us. The judgment is affirmed.

AFFIRMED.

not to be reported in full

THE UNIVERSITY OF CHICAGO

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Not to be reported in final

STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

FILED

FEB 1 1932

Robert B. Roy
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

OCTOBER TERM, A. D. 1931.

94

TERM NO. 53.

AG. NO. 31.

A. J. BINKLEY, Admr. etc., :
Appellee, :
V. :
THE PRUDENTIAL INSURANCE CO., :
Appellant. :

APPEAL FROM

MARION CITY

COURT.

264 I.A. 636'

BARRY, P. J. - This is a suit on a life insurance policy. A jury was waived, the Court found the issues in favor of appellee and rendered judgment for \$500.00. The insured made application for the insurance on November 13, 1930 and was examined by appellant's medical examiner, eight days later, who found and reported to appellant that the applicant was a first class risk and appeared to be in good health. The policy was issued December 1, 1930, and was delivered to the insured about December 15th. The insured died December 27, 1930. Appellant defended on the sole ground that the insured was not in sound health on the date the policy was issued, and by reason thereof it was not in effect under the following provision:- "This policy shall not take effect if the insured die before the date hereof, or if on such date the insured be not in sound health."

Appellant proved by Dr. Fowler that he treated the insured for gastric ulcers in the stomach during the month of May 1930; that apparently he recovered from that attack but the ulcers were not cured from that time until his death. The doctor treated him again in December 1930 and found him suffering from the same trouble and that death resulted therefrom. Upon that evidence appellant insists the judgment should be reversed with a finding of facts.

It has been held that provisions similar to the one in question merely mean that the applicant has not contracted a disease

[illegible]

between the date of the application and the issuance of the policy. Johnson v. Royal Neighbors, 253 Ill. 570; W. & S. Life Ins. Co., v. Davis, 132 S.W.(Ky.) 410; Modern Woodmen v. Atkinson, 155 S.W. (KY.) 1135; Chinery v. Metropolitan Life Ins. Co., 182 N.Y.S. 555. The provision in question does not apply to the condition that existed prior to and at the time of the making of the application. If such a condition is relied upon as a defense it must be based on some other provision of the insurance contract. Appellant states emphatically that it relies upon no other provision. The evidence produced by appellant is to the effect that the insured had gastric ulcers from May 1930 until his death. The Court did not err in its rulings on the propositions of law and the judgment is affirmed.

not to be reported in full ^{AFFIRMED.}

between the date of the commission and the issuance of the writ,
Thomas v. Royal Bank, 100 Cal. 115, 34 P. 115, 116, 117,
118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129,
130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142,
the provision in question was not applied in the manner that would
have been the case at the time of the commission of the act.
A condition is stated upon a contract to be made in such
cases, provided the contract is not voided, it is not voided.
Historically, that is, as to the effect upon no other provision. The evidence pro-
duced by agreement is to the effect that the insured had made
agreements from the time the contract was made. The contract did not in
its terms or the intention of the law and the purpose is without.

May it be reported as full

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STATE OF ILLINOIS, FEB 1 1932

A P P E L L A T E C O U R T,

FOURTH DISTRICT.

Robert B. Roe
CLERK OF THE DISTRICT COURT
FOURTH DISTRICT OF ILLINOIS

October Term, 1961.

Agenda 18.

Term No. 10.

264 I.A. 636²

Cornelius Biebel,

Plaintiff in Error,

vs.

Dan Thompson,

Defendant in Error.

Writ of Error to Circuit

Court of St. Clair County.

EDWARDS, J.

This writ of error is to review a judgment of the Circuit Court of St. Clair County, rendered in favor of defendant in error, in an action of case, brought by plaintiff in error to recover damages for personal injuries which he claims to have sustained by reason of defendant in error negligently driving a motor car on a highway a few miles from Belleville on November 3, 1929.

The declaration, as originally drawn, consisted of a single count which charged generally that defendant in error negligently ran his car at a dangerous rate of speed, and as a consequence ran into plaintiff in error, breaking his leg, and occasioning other injuries. By leave of court, an additional count was filed, which charged that defendant in error, while attempting to pass the car of plaintiff in error,

averring that at the time the note was signed by appellant, it was

so carelessly managed his automobile that he ran too close to the car of the latter, and that plaintiff in error, who was in the highway, pushing his car off the pavement, was struck and injured. Defendant in error pleaded the general issue; trial was had before a jury, and a general verdict of not guilty was rendered.

There was also submitted to the jury, at the instance of defendant in error, a special interrogatory, whether or not plaintiff in error, at the time of, and just prior to, the accident, was in the exercise of due care and caution for his own safety. The jury made its special finding, answering the interrogatory in the negative. Motion for a new trial was overruled, judgment for defendant in error was entered, and this writ of error prosecuted to reverse same.

The general verdict was signed by all the jurors. The special finding was returned unsigned, and plaintiff in error urges that for this reason it has no force or validity.

In *Harrison v. Singleton*, 3 Ill., 22, it was held that on a trial in the Circuit Court, jurors do not need to sign the verdict. In *Griffin v. Larned*, 111 Ill., 435, the rule was stated to be: "Whatever may be pronounced as the verdict by the jury in open court, whether in writing or verbally, through the foreman, is to be regarded as the verdict of the jury." The special finding was sufficient.

Plaintiff in error did not move, in the trial court, to set aside the special verdict, nor did he in his motion for a new trial specifically attack same. Failing to do so, he is conclusively bound by the finding of the jury on the special interrogatory.

averring that at the time the note was signed by appellant, it was



(Brant v. Chicago & Alton R. R. Co., 294 Ill. 615). Nor did the general assignment of error in the motion for a new trial, to the effect that the verdict was contrary to the evidence in the case, raise the question as to the sufficiency of the special finding. *Brimie v. Belden Manf. Co.*, 287 Ill., 11.

The answer to the special interrogatory was a finding that plaintiff in error was guilty of contributory negligence which was a defense to his suit.

Upon this record, for the reasons stated, the special finding is conclusive against plaintiff in error, and the trial court rightly entered judgment upon the verdict in bar of the action.

The judgment is affirmed.

Not to be reported Judgment affirmed.

96 H
FILED
STATE OF ILLINOIS, FEB 1 1932
APPELLATE COURT, *Monroe Co. Ill.*
FOURTH DISTRICT. *Clerk of the Circuit Court*
Fourth District of Illinois

October Term, 1931.

Agenda 31.

Term No. 18.

264 I.A. 636³

Commercial State Bank of Waterloo,)
Appellee,)
vs.)
C. A. Hughes,)
Appellant.)

Appeal from Circuit Court
of
Monroe County.

EDWARDS, J.

The Circuit Court of Monroe County, on May 4, 1931, gave judgment by confession in the sum of \$681.70 and costs, in favor of appellee and against appellant. On May 27, 1931, appellant filed his motion, supported by his own affidavit, together with one by his attorney, to vacate and set aside such judgment, and for leave to plead. The court denied the motion, and from the order of denial, appellant has perfected this appeal.

The salient averments of the affidavit of appellant, which alone sets forth the grounds of the motion, are that appellant and one Weyl were partners, doing business as the Monroe Brooder Co.; that Weyl arranged with the cashier of appellee to borrow \$500.00 for the partnership; that appellant was to execute his individual note therefor; that pursuant to such arrangement, appellant executed the note in question, the proceeds being placed to the credit of the Monroe Brooder Co., and by it checked out; the affidavit further averring that at the time the note was signed by appellant, it was

agreed by appellee, Heyl and appellant, that appellee would ~~not~~ collect said note from the partnership, and would not call upon appellant to pay same. That the partnership has since been dissolved, Heyl taking over its assets, and in writing agreeing with appellant to assume the liabilities of the firm, including the note sued upon.

This affidavit does not state whether the alleged agreement of appellee, that it would not require appellant to pay the note, was verbal or written. If it was a written agreement, contemporaneous with and a part of the contract of execution and delivery of the note, such fact should have been averred. In the absence of such averment, the affidavit would be insufficient. On the other hand, if the agreement was verbal, it would not constitute a defense to an action on the note, - which on its face was an unconditional promise of appellant to pay the amount of same, - as it would, in effect, be an attempt to vary, by parol, the contents of a written instrument, absolute in its terms.

In Weaver, adm'r. v. Fries, 85 Ill., 356, where a verbal agreement of like character was pleaded to a suit upon a promissory note, the court held that a verbal promise of the payee, that the maker would not be called upon to pay the note, was no defense to the same; and to the same effect is Murchie v. Peck Bros. & Co., 160 Ill., 175.

The affidavit is, for another reason, insufficient. It broadly states that the parties entered into such alleged agreement. No facts are alleged from which the existence of such arrangement might be inferred. The simple statement that the parties so agreed, is but a conclusion. Affidavits of this character must aver facts, and are insufficient where they merely state conclusions. De Witt et al. v. Flint & Walling Mfg. Co., 132 Ill. App., 356.

The trial court correctly held the affidavit insufficient,

and properly denied the motion.
to be reported in full

Order affirmed.

97 H

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STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

FEB 1 1932

Robert P. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

October Term, 1931

Term No. 32.

Agenda 36.

Anna Reimann,
Defendant in Error,
vs.
Edward J. Schmitt,
Plaintiff in Error.

Error to the circuit Court
of St. Clair County.

264 I.A. 636⁴

EDWARDS, J.

Anna Reimann, hereafter called the plaintiff, recovered, in the Circuit Court of St. Clair County, a judgment in the sum of \$7,000.00 against Edward J. Schmitt, hereafter mentioned as the defendant, for an alleged breach of promise of a contract of marriage. Schmitt has sued out this writ of error to review such judgment.

The proof on the part of the plaintiff tends to show that she was a widow, living near Lebanon, on a small tract of land belonging to her father-in-law, where she supported herself by raising chickens, keeping a few cows, and doing washings for others. That the defendant, who was a neighbor, lost his wife, by death, in May, 1928; that during the summer of that year she was doing his washing; that during July he began calling upon her, and soon afterward spoke to her of marriage; that later in the season he proposed that she marry him, and on November 15 of the same year, she told him she would accept his proposal, and that he would have to get her a ring; that defendant stated he was then short of money, but would later procure the ring for her.

The proof on the part of plaintiff further shows that defendant called upon her once or twice a week, until the following

March; that he told her he was ready to marry her at any time, but she told him she did not wish the marriage to take place until a year had elapsed from the death of his wife; to this he assented, and asked that the engagement be kept secret. That about the month of March, 1929, his ardor appeared to cool, and he ceased his calls, and that on July 7, 1929, he told her he had changed his mind and would not marry her. It appears that plaintiff was willing to consummate the agreement at any time, after defendant's wife had been dead one year.

The defense was a denial of any marriage proposal or engagement, or that he ever talked to her on the subject; together with admissions by plaintiff, to two witnesses, that she was not going to marry Schmitt.

Defendant contends that the verdict is against the weight of the evidence, and that plaintiff's promise of marriage, if there was one, was conditioned upon his purchasing her a ring.

The proof was conflicting, and the evidence on either side of the controversy, standing alone and undisputed, was sufficient to sustain a verdict. We are unable to say that the verdict was against the weight of the testimony, and would not be warranted in disturbing the judgment for that reason. *Leeper v. Day*, 253 Ill. App. 183.

Certain rulings of the trial court are assigned as error. It appears that defendant was called as a witness by plaintiff, and examined as to his property holdings during 1929. On cross examination the defendant was asked the following question: "You still have debts?" To which he answered: "Yes sir." Objection being made by plaintiff's counsel, same was sustained by the court.

The defendant was entitled to show that prior to the alleged breach of contract, he had debts, and disclose their size and

number, but the rule did not authorize him to make proof of obligations incurred after such alleged breach. The question, as asked, was limited to the time of his testimony, and did not indicate whether it referred to debts incurred before such breach of promise, and continuing to exist at the time of the inquiry, or whether it related to liabilities occasioned thereafter. Under the rule as stated in *Sprague v. Craig*, 51 Ill., at page 292, and 9 Corpus Juris, 357, the question was improper.

Other rulings on evidence are complained of, but upon examination of same we do not think that defendant was prejudiced thereby.

It is insisted that the verdict was excessive. Plaintiff contends that the jury were warranted in awarding punitive damages, which would justify the amount. In cases of this character, exemplary damages may be assessed, where the defendant was guilty of fraud, deceit or evil motives. *Jacoby v. Stark*, 205 Ill. 34. We do not think the evidence here discloses the necessary elements to justify such a finding.

The proof showed that defendant was worth, at the time he declined to fulfill his promise of marriage, in the neighborhood of \$12,000.00. There were no circumstances of aggravation connected with the case. In view of the station of the parties, and the financial condition of the defendant, it is our judgment that the damages, as found by the jury, were excessive.

If the plaintiff will, within fifteen days hereof, file in the office of the Clerk of this court, a remittitur in the sum of \$3,000.00, the judgment will be affirmed; *in the sum of \$4000.* otherwise reversed and the cause remanded.

to be reported in full

Affirmed upon remittitur.

98 H
STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

FILED

FEB 1 1932

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

October Term, 1931.

Term No. 37.

Agenda 27.

Edith W. Johnson, Administratrix of)
the Estate of Wayne Johnson, Deceased,)
Appellee,)
vs.)
Illinois Central Railroad Company,)
Appellant.)

Appeal from Circuit
Court of Alexander
County.

264 I.A. 636⁵

EDWARDS, J.

About seven o'clock on the evening of September 16, 1930, N. E. Banksen, driving a Ford automobile, accompanied by Wayne Johnson, was driving into Cairo, on Sycamore Street. This street, near the city limits, is crossed by a switch track of appellant. At their intersection, the auto, and a string of cars backing over the crossing, collided, resulting in the death of Johnson.

Edith W. Johnson, as administratrix of decedent's estate, brought this action for damages. There was a trial, a jury verdict for \$10,000.00 in favor of appellee; motion for new trial overruled, and judgment on the verdict; from which appellant appeals.

The case was submitted to the jury upon two counts of the declaration, to which was pleaded the general issue. One of the counts charged negligence through failure to ring a bell or sound a whistle, as required by statute; the other, that the negligence was the failure of appellant to have a light on the advancing end of the foremost car as it approached, in the night time, the intersection of Sycamore Street and the switch track; that deceased was at the time in the exercise of due care for his safety; that in consequence

of such negligence, the auto in which he was riding was struck, and as a result he was killed; and that appellee, his mother, was thereby deprived of her means of support.

Appellant contends that the manifest weight of the evidence establishes the fact that at the time of the collision, the crossing was patrolled by a switchman with a lighted lantern, who was giving warning to the traffic in both directions over said street; that on the advancing end of the foremost car was another switchman with a light, and that before the train started for the crossing, from the point west of the street, where it had been standing, the engineer blew three blasts with the engine whistle, and that the fireman at the same time started the automatic bell ringing, and that same continued to ring until after the collision.

Appellee produced three witnesses to the accident, - Jackson, Smith and Sams; the first of whom testified that he was driving the auto; that he looked in both directions as he approached the crossing, and saw no train; that there was no switchman at the intersection; that no bell was rung nor whistle sounded. Smith stated that he was leaning against a telephone pole near the crossing, and that he saw the switchman precede the train and cross to the east side of the street; that he had a lighted lantern, but did not stop or give warning to the street traffic; that the engine bell was not ringing at the time of the accident, and there was no light on the end of the train; that some three or four minutes before the accident he heard the whistle blow. On cross examination he stated that he did not know whether the ~~lxxx~~ engineer whistled again before he started up; did not know whether the bell was ringing just about the time the train started; that if such signals were given, he did not hear them. Further, that he did not remember whether there was a switchman with a lantern on top of the first car. There was proof that about four days before the trial, this witness had

made a statement, taken by a stenographer, in which he stated that the whistle sounded and the bell continued ringing, and that the watchman gave the engineer the signal to come ahead.

The testimony of the witness Sans was that he was coming north in an auto; was about 150 yards from the crossing when the collision occurred; that he saw some one on the first car with a lighted lantern as the car came into the street, and did not want to be understood as saying that no bell was rung nor whistle sounded. This was all of appellee's proof bearing upon the giving of the signals.

The proof on behalf of appellant, as to ringing the bell or sounding the whistle, was that of the engineer Mathis, the fireman Hudgins, and Scott and Wilhoit, switchmen; all of whom testified that the whistle was blown three times before the engine started; that at the same time the bell was started ringing, and so continued until after the collision. As to the light on the first car, Scott and Webster, another switchman, both testify that Webster was on the east end of the first car, with a lighted lantern. They are somewhat corroborated in this by appellee's witness Sans, who testified that some one was on top of the train with a lighted lantern.

Wilhoit stated he was on the ground, with a lighted lantern, flagging the traffic in both directions, and that he gave the engineer the signal to come ahead. In this he is corroborated by Mathis, the engineer; also by Lowell Titus and Lura Woolridge, young people who were riding southerly along Sycamore street, and whose car had been passed by the one Rankson was driving. Titus testified that while he was still about two blocks distant from the switch tracks, he saw the switchman, with a lantern, in the middle of the street; that the flagman remained there, flagging the crossing, until the accident, and that when the collision occurred he had to

jump out of the way; that he saw him step to the west. Miss Woolridge testified that when some distance north of the crossing, she saw a switchman with a lantern, and then the box cars started across the street, followed by the crash.

It is thus apparent that the only witness who testifies for appellee, with any directness or positiveness, as to the failure of appellant to give the proper signals or warnings, or as to the failure to have the crossing flagged, is Bankson. Smith is uncertain as to principal events, and in addition is impeached by proof of statements at variance with his testimony. Sons' evidence tends to corroborate appellant, at least to the effect that they had a man with a lighted lantern on the forward end of the foremost advancing car, and in addition he specifically stated he did not know whether the bell was rung or the whistle blown.

We thus have the word of Bankson, who admitted he is about to sue appellant for damages growing out of the accident, opposed to the positive testimony of Wilhoit, Mathis, Scott, Huggins, Webster, Titus and Miss Woolridge, as to the elements charged in the declaration, and which appellee is obliged to prove by the greater weight of the evidence before she is entitled to a recovery.

Upon a careful consideration of the record, we are of the opinion that the manifest weight of the evidence establishes that the statutory signals were given as the train approached the crossing, and that the forward end of the first advancing car was covered by a flagman with a lighted lantern at such time, continuing until the collision, and that the negligence charged in the declaration has not been proven.

The judgment is reversed, and the cause remanded

Not to be reported in full

Judgment reversed and remanded.

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STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

FEB 1 1932

October Term, 1931.

Term No. 51.

Agenda 12.

James J. Fogerty,

Defendant in Error,

vs.

Edward C. Mauer,

Plaintiff in Error.

Error to City Court of

East St. Louis.

264 I.A. 637

EDWARDS, J.

James J. Fogerty, defendant in error, who will hereafter be referred to as plaintiff, brought suit in the City Court of East St. Louis against Edward C. Mauer, plaintiff in error, hereafter designated as defendant, to recover damages for injuries sustained through an automobile accident. Upon a trial there was a jury verdict in the sum of \$20,000.00, upon which the trial court, after overruling a motion for a new trial, rendered judgment; to review which Mauer has sued out this writ of error.

On August 31, 1930, the parties named, together with defendant's wife, left the City of Alton in Mauer's sedan, driven by defendant, enroute to Galesburg; the plaintiff accompanying them as an invited guest. When near Bluff Springs, in Cass County, the car ran into a ditch, and plaintiff was severely injured.

The testimony is undisputed that defendant drove the car at a high rate of speed. Plaintiff claims he asked him to diminish the speed on several occasions, which is denied by defendant.

The chief ground of defense is that both parties were more

or less under the influence of intoxicating drink; that plaintiff was thereby guilty of negligence which proximately contributed to his injury. Defendant testified that they had several drinks in the morning before starting; also some more drinks along the way. This was denied by plaintiff, who stated that he drank none, and that so far as he knew, defendant had none. After the accident there was found in the car, a small metal ice box containing cracked ice, the glass of broken bottles, and one unbroken bottle which was shown to contain beer. There was also, in and about the car, a pronounced alcoholic odor, and there is proof, by those who came to the scene of the accident shortly after its occurrence, that Fogerty and Mauer each had the odor of liquor upon his breath.

Plaintiff, on the witness stand, stated that he was not intoxicated at any time on the day in question; that when the accident took place he was struck on the head and rendered unconscious, from which he did not recover until after he reached the hospital in Jacksonville.

Defendant called as a witness, R. R. Jokisch, who was sheriff of Cass County on August 31, 1930, and who arrived at the scene shortly after the occurrence. Jokisch testified that he found both Mauer and Fogerty on the ground; helped them to the road and into the ambulance; that both had liquor upon their breath. The sheriff qualified, as to his knowledge of intoxicated persons, by observation and contact in the course of his official duties. He was asked to state whether Fogerty, in his opinion, was intoxicated.

Objection was made and sustained. Later he testified that Fogerty talked some; heard him say a few words, and was again asked whether in his opinion Fogerty was under the influence of intoxicating liquor. Objection was made on the ground that all the evidence was to the effect that Fogerty was then unconscious, and the court sustained the objection, saying in substance that if a man received

such a bump on the head that he was knocked unconscious, it would be hard to tell whether the resulting stupor was due to the injury or to intoxication.

Following the court's ruling, defendant then made the following offer of proof:

"Mr. Oehmke: I offer to prove by this witness that he saw Fogerty, the plaintiff, shortly after the accident; that at that time Fogerty was not unconscious; that Fogerty then talked to this witness; that this witness is capable of judging whether or not he was under the influence of intoxicating liquor; that he looked at him while he was standing near to him and smelled liquor on his breath at that time, and came to the opinion that Fogerty, the plaintiff in this case, was under the influence of intoxicating liquor."

Defendant made the following objections to this offer of proof:

"Mr. Costello: I object to that for the reason that it is immaterial, irrelevant and incompetent whether or not Fogerty was under the influence of intoxicating liquor, and for the further reason that the evidence shows that Fogerty had received a serious injury which had rendered him unconscious."

The court sustained the objections as made, and defendant assigns the ruling as error.

The objection embracing two grounds, we will consider them separately. The first, that it was immaterial, irrelevant and incompetent, whether Fogerty was under the influence of intoxicating liquor, is clearly untenable. The defendant was contending that plaintiff was guilty of a want of care, which contributed proximately to his injury. The cases hold that where such is the situation, whether the plaintiff had been drinking, and was to any extent under

the influence of intoxicants, is a fact proper for the jury to consider, as bearing upon the question of the care and prudence of the party at the time of sustaining the injury. So. Chicago City Ry. Co. v. Dufresne, 200 Ill., 464. Elgin A. & S. Traction Co. v. Brown, 129 Ill. App., 65.

As to the second ground of objection, being that the proof showed Fogerty unconscious as the result of a serious injury. Whether Fogerty was in a stupor at the time, was a disputed question, and it will be observed that the offer was to show, by the witness, that Fogerty was conscious at the time and talked to the witness; that he looked at Fogerty, while standing near to him, smelled liquor on his breath, and that the witness formed the opinion that he was then intoxicated.

There had previously been testimony by plaintiff himself that after the accident he was in a stupor, but here the defendant sought by the offer, among other things, to prove the contrary; to show that he was conscious. Had the sheriff been permitted to testify that he was then conscious, and talked to him, together with observing him and smelling liquor on his breath, the witness, undoubtedly, would have been qualified to express his opinion as to the question of plaintiff's intoxication. The effect of the court's ruling was a denial of defendant's right to controvert important testimony given by the plaintiff himself. This was error.

Whether plaintiff was guilty of a want of ordinary care which proximately contributed to his injury, was a vital issue in the case, and the proffered testimony, as to his being intoxicated at the time, was a material fact as tending to show a want of such care on his part, and was important for the jury to consider in determining this necessary element of the case. Illinois Central R. R. v. Cragin, 71 Ill., 181. The court's ruling prevented Wauer from making a substantial part of his defense.

Judgment reversed, and remanded.

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Reversed and remanded.

STATE OF ILLINOIS
APPELLATE COURT
SOUTH DISTRICT

OCTOBER TERM A.D. 1931.

Term No. 9.

Agenda No. 19. FILED

FEB 1 1932

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

-VS-

FRANK SCHILL,

Plaintiff in Error.

Robert B. Roe
CLERK OF THE APPELLATE COURT
SOUTH DISTRICT OF ILLINOIS
From
BOND COUNTY
COUNTY COURT.

264 I.A. 637²

Fulton, J:

Plaintiff in Error was convicted in the County Court of Bond County for violation of the Prohibition Act. The information in the case contained three counts and the jury found Plaintiff in Error guilty under the first count, which charged the possession of "Intoxicating liquor, to-wit: whiskey, commonly called hule."

The Court denied the motion for new trial and arrest of judgment and sentenced plaintiff in error to imprisonment for ninety days at the Illinois State Farm, and that he pay the costs of prosecution.

It is contended by Plaintiff in Error that the evidence produced by the prosecution is not sufficient in law to justify a verdict of guilty in error and force as charged in the information. The facts show that on the evening of February 23, 1931, the sheriff of Bond County, with two deputies, proceeded to execute a search warrant duly issued for a search of the property of the Plaintiff in Error in the city of Greenville. The officers gained admittance to the house and found a bottle containing liquor in the slop pail, also four stacks of empty beer bottles. In a shed on the

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premises they found four dozen empty pint whiskey bottles, two one-gallon jugs and one or two kegs that smelled and looked as if they had contained liquor, and buried in the ground back of the house they found nine pints of whiskey. This liquor was turned over to a chemist for analysis, who testified that it contained fifty-one per cent of alcohol by volume.

While some of the testimony might not have been competent if objected to, and while certain portions of the evidence standing alone would not be sufficient to support a verdict of guilty, on the whole we believe there is plenty of competent testimony to sustain the verdict and judgment of conviction.

After briefs and abstract had been filed, the Plaintiff in Error asked leave to file an additional error and to make suggestions or citations regarding same, and seeking to raise some question about Instruction number seven, given on behalf of the People. The abstract filed by the Plaintiff in Error does not show any exception taken to the giving of this instruction and neither does it show who offered the instruction. In the case of Distilling Co. vs E. & E. Ry. Co. 136 App. 479 at page 482 the Court said, "It is a familiar rule of practice in the Courts of appeal of Illinois that the abstract must show the errors complained of, and that if it does not show the error, nothing is presented for consideration. The Court may look into the record for the purpose of affirming, but will not do so for the purpose of finding something not disclosed by the abstract, for the purpose of reversing. The abstract does not show who presented and requested any of the instructions given or refused. In this state of the abstract we would not be warranted in reversing the judgment because of anything that we may discover upon a search of the record, but we may look into the record for the purpose of finding whether the judgment is meritorious."

The motion to consider suggestions as to additional error is therefore denied, and the judgment of the Court - Court of Bond County is affirmed.

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STATE OF ILLINOIS
APPELLATE COURT
SECOND DISTRICT

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CLERK OF THE APPELLATE COURT
SECOND DISTRICT OF ILLINOIS

101
OCTOBER TERM A.D. 1931.

Term No. 25

Agenda No. 8.

Arthur Henry Fix ,
Appellant,

vs

Harr Range Company,
a Corporation,
Appellee.

Appeal from

Circuit Court

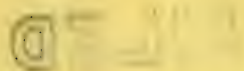
St. Clair County.

264 I.A. 637³

Fulton, J:

This action was brought by Appellant against Harr Range Company, a Corporation, Appellee and was tried at the September Term, 1930 of the Circuit Court of St. Clair County. The jury returned a verdict finding the Appellee not guilty. No motion for new trial was made or filed during the September Term of the Court and no further action was taken by the Court during that term. The case was continued to the January, 1931 term of said Court under the general order and on January 14, 1931, being one of the days of that term of court, the Appellant filed his motion for new trial. On February 19, 1931, being also one of the days of the January Term of court, the Appellee filed a motion to strike the Appellant's motion from the files, on the ground that said motion for new trial was not filed during the September Term of said court when the verdict of the jury was returned.

Both motions were argued before the Court and taken under advisement. The case stood continued under the general order until the April Term of said court and on July 3, 1931, the Court allowed Appellee's motion and ordered Appellant's



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motion for new trial stricken from the files, and thereupon entered judgment on the verdict of the jury in favor of Appellee for costs of suit.

Appellant insists that the Court erred in striking from the files his motion for new trial and that the Practice Act, Section 77, Chapter 110, clearly permitted the filing of his motion at a subsequent term where no final judgment had been entered.

The section reads as follows:- " Verdict- New Trial. Sec. 77. It shall be sufficient for the jury to pronounce their verdict, by their foreman, in open court, without reducing the same to writing, and the Clerk shall enter the same in form, under the direction of the Court; and if either party may wish to except to the verdict, or for other causes, to move for a new trial or in arrest of judgment, he shall, before final judgment be entered, or during the term it is entered, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion. *** "

The Appellee interprets this section to mean that motion for new trial must be filed in- during the term at which the case is tried, but this position is not sustained by the authorities cited in his brief, and our Courts have said in the language of the Statute that either party may enter a motion for new trial at any time before final judgment .

C. & M. Ry. Co. v Dinick, 96 Ill.42
Constantine v Foster, 57 Ill.36.

Appellee also urges that the Appellant cannot prevail in this appeal because the record filed by him in this cause is not sufficient to enable the Court to pass upon the case and also that the action of the Trial Court was a substantial denial and overruling of Appellant's motion for a new trial.

As we view the record, the Trial Court allowed the motion to strike supposedly on the grounds set forth in the written motion and without hearing the motion for new trial on its merits.

This action we believe to have been reversible error and therefore the case will be reversed and remanded to the Circuit Court of St. Clair County with instructions to overrule Appellee's motion to strike and to consider Appellant's motion for new trial on the merits.

to be reported in full REVERSED AND REMANDED.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM A.D. 1931.

Term No. 50.

Agenda No. 11.

EDNA APPLETON,
Appellee

vs

MONTGOMERY WARD & CO.,
Incorporated,
Appellant.

APPEAL FROM

CITY COURT OF ST. LOUIS

ST. LOUIS.

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FEB 1 1932

FULTON, J:

264 I.A. 637

Appellant prosecutes this appeal from a judgment against it for \$10,000.00 entered upon a verdict of a jury in an action to recover damages for slanderous words spoken to Appellee, and unlawful detention, amounting to false imprisonment.

The declaration contained three counts. The first count for slander, charges that Appellant by its manager, H.L. Jeter, in the presence of divers persons, falsely and maliciously spoke certain scandalous/and defamatory words, which in substance were that she had taken money amounting to \$50.00 belonging to Appellant; that she was guilty; that Appellant could not have people working for it who would steal; that it had to have people who were honest and that she would have to be discharged. The second count charges that Appellant, through its Assistant Manager, D. Frederickson, spoke and published in the presence of others, similar scandalous, false and defamatory words about Appellee, all in effect charging her with taking \$50.00 in money belonging to Appellant.

Both counts conclude with the averment that Appellee never at any time took from Appellant said sum of \$50.00, or any other amount. The third count charged Appellant, through its manager and assistant manager, with accusing appellee of having stolen the \$50.00, and that they imprisoned and detained Appellee in the offices of Appellant for a long period of time, without any

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reasonable or probable cause, and against the will of the Appellee. Appellant filed the general issue.

Appellee was employed in the office of Appellant in its general mercantile store in East St. Louis; her duties consisted of taking payments, typing contracts and handling money that came up from the floor and assisting the cashier and bookkeeper in the office. She testifies that on August 29, 1930 about two o'clock in the afternoon the manager, W.L. Jeter, began asking her about receipts and about \$50.00 in money that was missing. She said he accused her with having taken the money; that he couldn't have anyone in his employ who stole money and that he had to have someone who was honest. She also testified that the assistant manager, Frederickson, said that \$50.00 was missing and that she got the money and then Jeter discharged her; that the regular quitting time was 5:30; that she was nervous and crying during the afternoon and that when she went to get her hat about 5:30 Jeter told her to stay around while, he wanted to talk to her and that she stayed until 8:30; with Mr. Jeter and Mrs. Evans present in the office. During the afternoon in addition to Jeter and Frederickson, there was present the cashier, Mrs. Evans; the bookkeeper Miss Gray; and Mr. Harup, a company salesman from Alton. She was corroborated in part by one witness, Mohm. He was employed in the furniture department of Appellant's store and testified that he came to the office window about 2:30 on the afternoon in question and saw Jeter, Frederickson and Appellee engaged in conversation; that Frederickson told Appellee that she was guilty; that she was guilty of taking \$50.00; that he heard Jeter say he couldn't afford to have people in his employ who were thieves; that he saw Jeter double up his fist and that the talk of Jeter and Frederickson was rough; that the regular quitting time was 5:30 and that Appellee left the office about six o'clock. No other witnesses were called on the part of the plaintiff.

In behalf of Appellant six witnesses were sworn, and outside of a few discrepancies in minor details told substantially the same story. All of these witnesses were employees of Appellant on August 29, 1930, but three of them were otherwise employed at the

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time of the trial. The witnesses testify that during the month of August, 1930, there had been shortages and overages in the cash; that certain receipts were found in the waste basket which were in the handwriting of Appellee and one of which had recently been handed in and the money paid on it to Appellee by the witness Varup. Three of Appellant's witnesses testified that Appellee admitted having thrown the receipts in the waste basket but she positively denied such admissions.

The proof of Appellant further showed that although Jeter and Frederickson did question Appellee about the receipts, they did not accuse her of stealing any money, did not accuse her of being a thief and did not tell her she was dishonest; that neither Jeter nor Frederickson talked to her in loud, rough or angry tones, and that Jeter did not at any time double up his fist and menace or threaten Appellee. None of these witnesses saw Gohn at the office window during the afternoon. Mrs. Evans, the cashier, and Miss Gray, the bookkeeper testify that Jeter said nothing to Appellee about money; that on the day in question there was no money missing; that there was no shortage of \$50.00 or overage of that amount; that at the close of the interview the Appellee was discharged; that she was not told to stay after quitting time and that she left with Mrs. Evans and Miss Gray. All of the witnesses present at the time and near enough to see and hear, deny positively that the alleged slanderous words were used toward, or about Appellee.

While Appellee points out some discrepancies and some conflicts in the testimony of Appellant's witnesses, on the whole ~~their~~ story, tending to corroborate Appellant's version, is entirely believable.

Courts of Review are hesitant to set aside a verdict of a jury, and yet after examining the testimony and giving due consideration to the stories of the witnesses on both sides, it is the opinion of ~~the~~ ^{the} Court that ~~the~~ ^{the verdict is} clearly against the weight of the evidence, ~~and~~ it is its duty to set it aside and reverse the judgment.

Donelson v East St. Louis Ry.Co. 255 App. 625.

The testimony of the Appellee is not in all respects
page three.

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as certain, definite and satisfactory as the positive statements of Appellant's witnesses as to the alleged slanderous words used toward Appellee, and the corroboration by the witness John is also somewhat uncertain and in some respects contradictory, and we therefore believe that the verdict is manifestly against the weight of the evidence and that the judgment must be reversed.

It should also be noted that, in our opinion, there was not sufficient evidence of unlawful restraint or detention of Appellee on the part of Appellants' managers to support the third count of the declaration alleging false imprisonment.

"While in general no actual force or compulsory seizure is necessary to constitute an imprisonment, there must be words and acts used and done toward the person to be arrested, clearly showing an intention to arrest and his submission must be to a threatened and reasonably apprehended force. "

Greathouse v Summerfield 25 App. 296.
Cox v Rhodes Ave. Hospital, 198 App. 82.

Various other errors are alleged, but in view of our conclusions as to the evidence we feel that the judgment should be reversed and the cause remanded for the reasons indicated.

REVERSED AND REMANDED.

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